

## The Central Law Journal.

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### CURRENT EVENTS.

IN view of the attention, at this time, drawn to the Indian Territory, and the passage, by the house of representatives, of what is known as the Oklahoma bill, the leading article in this issue on the "Rights of the Cherokees," will, we think, be found of interest, as being a clear statement from the pen of one who has made the subject a study, of the tenure by which the Cherokee nation hold and own the land which is sought to be appropriated, and the legal obstacles in the way of such an appropriation. As we understand it, there is included, in the terms of the Oklahoma bill, considerable land, within the confines of what is generally known as the Indian Territory, which the United States can, without question or legal objection, appropriate and sell. Oklahoma proper was originally sold by the Creek Indians to the United States, conditioned that the latter would settle thereon "friendly Indians." There were no friendly Indians to settle there. Therefore the condition failed and, of course, the land could not be opened for general settlement. The effect of the recent treaty concluded with the Creek Indians was in reality a sale to the United States of their equitable or reversionary interest. But to this land the Cherokees make no claim whatever. What the latter claim, (and upon this is predicated the legal contention) is the "outlet" or "strip" of six million acres embraced in the same patent whereby they obtained the land upon which they now live. Mr. Blair shows, very plainly, that the title of the Cherokees to this piece of land is as clear, and unassailable as that of any property owner in the United States, and that the proposition to appropriate them is in absolute violation of law and justice.

And in a strictly legal point of view, leaving out of consideration questions of politics or expediency, it would seem, to the unbiased student of law, that the objection of the Cherokees is well founded, and that the land

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sought to be thus confiscated, under the form and sanction of law, is held by treaty in such a manner that it cannot be encroached upon, even in the methods proposed, without breaking solemn obligations of the government of the United States towards the Indians.

PERHAPS there is not a public question which is exciting more general interest, and upon which the attention of legislators and law makers is more securely fixed, than that of ballot reform. The movement in this direction, born on foreign soil and but recently adopted in one of our States, has spread with surprising rapidity, and a sincere and zealous effort is now everywhere manifest to correct the abuses which have crept into the execution of our present election laws. It is generally understood that the system of ballots and voting, which is the basis at least for the Massachusetts statute and for most of the proposed enactments, is of Australian origin, but few know its features or comprehend its scope. Therefore the public will find much of value and interest in a book recently prepared by Mr. John H. Wigmore, of the Boston bar, on "The Australian Ballot System as Embodied in the Legislation of Various Countries," which has just come into our hands. The design of the author was, as he says, to sketch the history of the measure known as the Australian ballot system, as it passed from State to State in Australasia on to the mother country in Europe, thence westward to Canada and eastward to continental countries and finally westward again to these United States.

The thought, so admirably expressed by Mr. Wigmore, will occur to many that, "where a community has reason to believe itself numbered among the enlightened ones of its age, and its institutions to be pre-eminent among those of civilized mankind as types of liberty and progress, it relaxes (it may be) the constant strain of high endeavor; an easy complacency settles upon it; and it awakes one day to realize that a community, having no pretensions to as conspicuous a rank among nations, has grasped the torch of progress and now leads the way with intelligent and advanced methods, pointing the path for its more eminent fellows to pursue. With some such reflection as this must En-

gland, and our own commonwealth, look upon the history of ballot reform in the past fifty years. Before representative government in Australasia had an existence, corruption, fraud and intimidation (to name none of the less palpable evils that beset an election) thrived abundantly in Great Britain and Ireland, and even in our own country had begun to take root. But it was reserved for strippling States, when to them in their turn the exigency came, not merely to apply, but to invent an effective remedy and to indicate a cure for at any rate the grosser evils that prevent an election from being what at the least it should be, the free and accurate expression of the opinions of the electors."

From this book we learn that the system is undoubtedly Australian by birth, the father of the measure being Francis S. Dutton, member of the legislature of South Australia from 1851 to 1865. The first enactment was 1857-8, though not until 1887 was it applied to all elections held in that country. It was adopted in Victoria in 1865, and thereafter in Tasmania, New South Wales, New Zealand, Queensland and West Australia. Meanwhile its good results had reached England, where thoughtful men were anxiously looking for some solution of the problem. It was, after considerable agitation, first adopted in that country in 1872, but not until the year 1888 was it applied to all elections, so that now the entire field of elections in England and Wales is covered by the Australian system of balloting. Thereafter it was adopted in Canada and in some of the continental countries. The first effective movement in this country was that of Louisville, Ky. (act of February 24, 1888), in its essential features like the Australian system. Massachusetts followed May 30, 1888. The success of the system has everywhere been recorded. Its cardinal features as everywhere adopted, are two: First. An arrangement for polling by which compulsory secrecy of voting is secured. Second. An official ballot containing the names of all candidates printed and distributed under State or municipal authority. Each, as Mr. Wigmore points out, has an efficacy of its own, and, to that end, he argues that the best results are to be reached, when preventive legislation is planned, by adopting one of these courses, viz: First. By making

the detection of the offense absolutely certain. Second. By taking away all interest in its commission or by making it profitable to refrain. Third. By making the offense physically impossible. In other words, the secret of effectively reaching an evil by law is either to insure its detection, to render it impossible, or to make it unprofitable. In this way the compulsory secret ballot, and the official ballot feature have the effect to check bribery, prevent intimidation, improper influence, etc. In short, it is claimed that the secret ballot approaches these more or less elusive evils, not merely with the weak instrument of a penal clause for this and that offense, but with the effective methods of modern legislation. By compelling the dishonest man to mark his vote in secrecy, it renders it impossible for him to prove his dishonesty, and thus deprives him of the market for it. By compelling the honest man to vote in secrecy, it relieves him not merely from the grosser forms of intimidation, but from more subtle and perhaps more pernicious coercion of every sort.

A large portion of this book is taken up with the text of the different statutes as they exist in Massachusetts, South Australia, Queensland, Great Britain, Belgium and other countries. But, as the substantial features of each are the same, it will be sufficient to notice the Massachusetts statute, and that only in a general and cursory manner.

It provides that the printing and distribution of ballots shall be paid for by the State in all elections except municipal, when the expense shall be that of the cities.

Any convention of delegates representing a political party which polled at least three per cent. of the whole vote cast may make a nomination, and a certificate of such nomination shall be made and sent to the secretary of State.

Informal nominations may be made by nomination papers, signed by not less than one thousand voters.

All certificates of nomination and nomination papers shall specify: First, the office for which the candidate is nominated; second, the party or principle he represents; third, his place of residence, with street and number thereon. In case of presidential electors the names of the candidate for president and vice-president may be added.

Certificates of nomination and nomination papers must be filed with the secretary of State or city clerk a certain number of days before the election.

Any question arising upon them shall be settled by the secretary of State, auditor and attorney general, without any appeal.

Any person who has been nominated may withdraw by request in writing, signed and acknowledged by him before an officer qualified to take acknowledgments, and the withdrawal must be sent to the secretary of State or city clerk a certain number of days before the election.

The ballots shall have only the names of those nominated, alphabetically arranged, with party designation or principle represented by each candidate, leaving blank space for insertion of other names.

Ballots shall be folded and fastened together in blocks in such manner that each may be detached separately.

At each polling place there shall be two sets of such general ballots.

Full instructions to voters in large type shall be printed, to be hung up at the polling places.

Names of all the candidates shall be publicly posted for a certain number of days before the election.

Two sets of ballots, prepared by the secretary of State, shall be furnished to city and town clerks a certain number of hours before the election and receipts given for same.

These shall be packed by city and town clerks in separate sealed packages, with marks to show its polling place.

The city and town clerk shall, before the opening of polls, send to the election officers one set of ballots so prepared and marked, for which a receipt shall be given. At the opening of polls the seals shall be broken.

Two inspectors, with two deputies additional to those now provided, shall be appointed in each voting precinct.

The officers who designate polling places shall provide a number of compartments or closets without doors, in which voters may conveniently and secretly mark their ballots, and a guard rail shall be so placed that only such persons as are inside said rail can approach within six feet of the ballot boxes or of the voting compartments. But neither the

former nor the latter shall be hidden from the view of those just outside the rail.

Any person desiring to vote shall give his name and residence to one of the ballot clerks, who shall announce it in a loud voice, and if the name is on the poll list he shall be allowed to enter the space inclosed by the guard rail. The ballot clerk shall give him one ballot. He shall then enter one of the compartments and mark an X opposite the name of the candidates of his choice for each office to be filled. He shall fold his ballot without displaying the names on it and vote it folded.

Any person who from blindness or from physical disability is unable to mark his ballot, may have it marked for him by an election officer.

If a voter marks more names than there are persons to be elected to an office, or if impossible to determine a voter's choice, the ballot shall not be counted.

Finally, penalties are provided for a voter who intentionally shows his ballot or interferes with a voter, or who shall endeavor to induce any voter before voting to show how he marks or has marked his ballot, and against officers of election.

In this book may also be found a cut or diagram of a polling place, with compartments, as established by law, and of ballots under the different systems.

It is to be hoped, that this book will find its way into the hands of legislators generally, and inspire them with the determination to solve this perplexing problem, and to make the ballot, in the language of John Pierpont, who, though many years dead, may have had this reform in his mind:

"A weapon that comes down as still  
As snow-flakes fall upon the sod,  
But executes a freeman's will  
As lightning does the laws of God;  
And from its force, nor doors, nor locks  
Can shield you—'tis the ballot box."

## NOTES OF RECENT DECISIONS.

In the case of *City of Shreveport v. Cole*, 9 S. C. Rep. 210, decided by the Supreme Court of the United States, the contention was that a constitutional provision adopted by the State of Louisiana, impaired the obligation of contracts, and, therefore, involved a question arising under the constitution and laws of the United States. The facts were that petitioners had a claim on a contract, for balance due them from the city of Shreveport, for the enforcement and collection of which they had adequate remedies, but that before its collection the people of the State adopted a new constitution, article 208 of which had deprived them of all remedies for the enforcement of the claim in this, viz: by limiting municipal taxation for all purposes whatever to ten mills on the dollar of valuation, and this, with the available funds of the city, was not sufficient to pay any portion of petitioner's claim after deducting alimony. It was, therefore, alleged that article 208, so far as the same limits municipal taxation, is to them null and void, because it violates the tenth section of the first article of the United States constitution, which prohibits States from passing any law impairing the obligation of contracts. Petitioners, therefore, asked that the provision of the State constitution be declared null and void. The court denied the writ upon the ground that the constitutional provision in question did not indicate on its face that it was intended to be applied to antecedent contracts, and that the argument of petitioners required the United States court to assume that the courts of Louisiana would hold that the city could lawfully avail itself of the constitutional limitation in question as a defense to the collection by taxation of the means to liquidate the indebtedness, notwithstanding that would be to apply it retrospectively to the destruction of an essential remedy existing when the contract was entered into, whereas the presumption in all cases is that the courts of the States will do what the constitution and laws of the United States require. *Railroad Co. v. Ferry Co.*, 108 U. S. 18; *Neal v. Delaware*, 103 U. S. 370. And indeed, in accordance with that presumption the Supreme Court of Louisiana holds, and had held prior to the commencement of this suit, that article 209

must have a rigid enforcement with regard to all creditors whose rights are not protected by the constitution of the United States, and with regard to all future operations of the city government of every kind whatever.

In the case of *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3, Judge Brewer, of the United States circuit court, in construing the recent act providing for removal of causes from State to federal courts, overrules the case of *Harold v. Mining Co.*, 33 Fed. Rep. 529. It appears that in the case sought to be removed, both plaintiff and defendant are non-residents of the district. Under the act of March 3, 1887, the plaintiff could not have brought the defendant into this court by original process, or at least could not have compelled it to stay here against its will, and the contention is that, as this court could not take original jurisdiction, it cannot take jurisdiction by removal. It will be observed from the language of the statute that the right to object to this court taking jurisdiction of the case, if the suit had been originally commenced here, is a personal privilege of the defendant, and may be waived by it. There is no lack of power in the court but only a personal right of defendant. Under the judiciary act of 1789, it was held that a suit pending in a State court between citizens of different States could be removed by defendant into the federal court, although by reason of his not being an inhabitant of or found within the district he could not have been sued originally in that court. *Sayles v. Insurance Co.*, 2 Curt. 212; *Barney v. Bank*, 5 Blatchf. 107; *Bushnell v. Kennedy*, 9 Wall. 387; *Green v. Custard*, 23 How. 484; *City of Lexington v. Butler*, 14 Wall. 282. And the same distinction was applied to the act of March 3, 1875, between the right of removal and the right to bring a party in by original process. *Claffin v. Insurance Co.*, 110 U. S. 81. Turning to the act of 1887, the court concludes:

It is obvious that the first part of section 1 describes in general terms the jurisdiction of the circuit courts, while the provisions of the latter part of the section refer, not to the general matter of jurisdiction, but to the particular court in which a case may be brought and tried. It is said by Chief Justice Waite, in *Ex parte Schollenberger*, 96 U. S. 378: "That the act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is

one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases; and certainly jurisdiction will not be ousted because he has consented." The same distinction between the general matter of jurisdiction and the particular court for suit and trial is recognized in *Fales v. Railway Co.*, 32 Fed. Rep. 673; *Gavin v. Vance*, 33 Fed. Rep. 84; *Loomis v. Coal Co.*, *Id.* 353. Turning to the second section, we find that the removable suits are those of which, by the first section, the federal courts are given jurisdiction. The language speaks of jurisdiction generally, and of courts in the plural. Any suit is removable of which any federal circuit court might take jurisdiction, and the mere fact that the defendant could have successfully objected to being sued in any one or more particular federal courts, does not destroy the general jurisdiction of federal courts, or prevent its removal. Take the case at bar. If the suit had been commenced in this court, and process served personally upon the defendant, and it had raised no question other than upon the merits of the controversy, this court would have had undoubted jurisdiction, and the judgment it rendered would have been valid. If the jurisdiction of the court upon his failure to insist upon his personal privilege be conceded in the one case, why should there be doubt of the jurisdiction when he voluntarily seeks the court. I am aware that in the case of *Harold v. Mining Co.*, 33 Fed. Rep. 529, I concurred with Judge Hallett in an opinion different from that herein expressed, but further reflection, after hearing the question discussed at length and frequently, has satisfied me that that opinion was erroneous. It is, perhaps, unnecessary to carry this discussion any further, and it is enough to say that we hold that the fact that both parties are non-residents of this district does not oust this court of jurisdiction in a case removed from the State court by a non-resident defendant.

In *Wilson v. Atkinson*, 20 Pac. Rep. 66, the Supreme Court of California say, for the first time, that, under Code Civ. Pro., § 322, possession of land under a void tax-deed gives color of title, and the statute of limitations is set in motion by such deed, and it is admissible in evidence for the purpose of defining the character and limiting the extent of the occupant's possession. The court says:

There is much diversity of opinion, in the decided cases, upon the question whether a deed, void on its face, is such a written instrument as will uphold and render effective the possession of real estate that would otherwise fail to give title. The deed in question was a written instrument, purporting to convey the real estate in controversy by proper description. It is properly executed and there is evidence tending to show that the defendant and her grantor claimed title under it as being a conveyance of the property. In some of the cases it is said that the conveyance must be good in form, contain a description of and profess to convey the property, and that, containing these requirements, it will give color of title, although in fact invalid and insufficient to pass the title, or actually void or voidable. *Packard v. Moss*, 68 Cal. 123, 8 Pac. Rep. 818, and cases cited. To sustain their contention that the deed, being void on its face, could not put the statute of limitations in motion, counsel for appellants cite the

following authorities: *Packard v. Moss*, *supra*; *Moore v. Brown*, 11 How. 414, 425; *Skyles v. King*, 2 A. K. Marsh. 385; *Walker v. Turner*, 9 Wheat. 542; *Shoat v. Walker*, 6 Kan. 65; *Cain v. Hunt*, 41 Ind. 466; 26 Am. Law Reg. 409, 416. We have given these authorities our careful attention. They are in the main based upon statutory provisions differing materially from our own, but in principle support the appellant's position. Many other cases to the same effect might have been cited. The decided cases are so conflicting as to aid us very little in attempting to arrive at a proper conclusion, but the reasoning by which the courts of the several States have supported the doctrines laid down are worthy of careful consideration. The statute of Wisconsin is in almost, if not quite, the exact language of our own, and the supreme court of that State has held in a number of cases that a tax-deed, void upon its face, is a written instrument within its meaning. *McMillan v. Wehle*, 55 Wis. 685, 693, 13 N. W. Rep. 694, and cases cited. As further supporting this doctrine we cite *Leslingwell v. Warren*, 2 Black. 599; *Pugh v. Youngblood*, 69 Ala. 296; *Gatling v. Lane*, 22 N. W. Rep. 227; *Dalton v. Lucas*, 63 Ill. 337; *Stovall v. Fowler*, 72 Ala. 77; *Pillow v. Roberts*, 13 How. 472, 476; *Wood, Lim. Act.* 522-536. The deed we are considering was not prohibited by law, and the officer who executed the deed was authorized to do so by the laws of this State. The only objection to it is that it shows that the legal steps necessary to authorize a sale of the property were not taken. The defect was not one which would be readily detected. Whether such a deed was in fact void has been a matter of grave question, but is now settled by the decided cases. The parol evidence in the case sufficiently shows that the holder of the deed entered and held possession of the land under it, claiming to be the owner of the property by reason of the conveyance, and that the plaintiff had actual notice of the adverse claim and its foundation. We are clear that under the circumstances of this case the deed was properly admitted in evidence for the purpose of defining the character and limiting the extent of the defendant's possession. See dissenting opinion of Mr. Justice McKee, in *Wilson v. Atkinson*, 68 Cal. 592.

The Supreme Court of Kentucky, in the case of *Stewart v. Mulholland*, 10 S. W. Rep. 125, decide an interesting question as to the revocation of a will. There a widow being about to marry entered into a matrimonial contract by which she attempted to secure to herself the right to own her separate estate, and make such disposition of it, by last will, as she saw proper. In accordance therewith she prepared a will in her own handwriting. It was dated January 9, 1876. The marriage contract was written and signed two days afterwards, and the same day the ceremony was performed. She there, in the presence of her husband, handed the will to a friend to take care of, and it was kept by him some years. The propounders of the will are met with the objection that the marriage revoked the will by reason of an express provision of statute, ch. 113, § 9, and that

under § 11 thereof, such a will can be revived only by a re-execution thereof. The court holds that the statute is plain in providing for the revocation of a will by marriage, and that as to a will so revoked the prohibition of the statute makes it absolutely void, which can only be revived by a re-execution. By the rule of the common law the marriage of a woman revoked a will previously made by her, because, if allowed to stand, it would affect the marital rights of the husband, and during marriage no power existed by reason of the disability of the wife either to revoke, alter, or make another will. At common law, however, where the wife had the right of disposing of her separate estate by an antenuptial agreement, her will previously made was not revoked by her subsequent marriage, and in this State a married woman may dispose of her separate estate by last will and testament. The court says:

It is not a question here whether the will was properly executed, for its validity prior to the marriage ceremony is not controverted, nor does the question arise as to whether or not a holographic will, once revoked, can be revived by a republication, when the statute requires a re-execution; but the question is, was the will of Mrs. Jacob revoked by her marriage with Stewart? It is conceded that by a contract the property rights of either could be regulated and fixed; but when a will is made in pursuance of that contract, and in this instance, where it is directly connected with the act of marriage, we are asked to say that the marriage revoked the will because dated two days prior to the antenuptial contract and the marriage ceremony. The marital rights having been settled (and we are proceeding now on the idea that we cannot but regard the entire action of the parties from the 9th to the 12th as one, so far as these contracts are concerned) by their agreement, and no one else being interested directly or indirectly, but the husband, why should the will of the wife be revoked? Was the statute intended to apply to any such case as this? It was to protect the marital rights of the parties that the statute was enacted, and it was never designed to prevent parties by written contract from fixing their marital rights, and to give to one or both, by an antenuptial contract between the two, the power to dispose of their estate by will. It is idle to say that by a deed evidencing a marriage contract the parties about to consummate it can before marriage fix and determine their right to property by reason of the marital relation that is binding on both, and cannot under the same contract agree that the one or the other shall dispose of their property by a will already executed, if made as the statute requires. The will made by the wife in this case was as much a part of the marriage contract as if it had been inserted in it.

THE Supreme Court of Oregon, in the case of *Rhoton v. Mendenhall*, 20 Pac. Rep. 49, undertake to define the meaning of the word

"concealed," as used in the statute of limitations. They say:

Webster defines the word "concealed," "to hide or withdraw from observation; to cover or keep from sight; as a party of men concealed behind a wall." It does not appear that the defendant did anything after his removal to this State whereby his identity or place of residence should be concealed or kept secret or hidden. In the absence of any statement to the contrary, and such is, no doubt, the fact, he lived openly in the community where he had fixed his residence in this State, without any effort or attempt in any way to baffle search or inquiry. These facts do not constitute concealment, within the meaning of that term as used in our statute. In *Frey v. Aultman*, 30 Kan. 181, 2 Pac. Rep. 168, the Supreme Court of Kansas gave a construction to the word "conceal" used in the statute of limitations of that State. It appeared that the defendant had formerly resided in Iowa; that he absconded from that State, and settled in Kansas, and that the plaintiff made reasonable efforts to find him, but failed. In passing on the question, the court said: "We think the word 'conceal' contemplates some action here; that he passes under an assumed name; has changed his occupation or acts in a manner which tends to prevent the community in which he lives from knowing who he is or whence he came. It cannot be doubted that the legislature has the power to make the statute of limitations absolute, and without any exceptions on account of concealment; and when we remember that this statute has no extraterritorial force, and therefore contemplates acts and conduct of the party within our limits, it would seem difficult to say that a man who, going under his own name, lives in a community in as open and public a manner as any other citizen in the same line of business, is concealing himself from the service of process within this State." This construction is decisive of this case. Counsel for appellant rely very much upon *Harman v. Locker*, 73 Mo. 622; *Nelson v. Beveridge*, 21 Mo. 22; *Wells v. Halpin*, 59 Mo. 92—and some other like cases were cited by appellant—but they do not support his contention. The Missouri statute, under which their decisions were made, provides: "If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited after the commencement of such action shall have ceased to be so prevented." These Missouri cases seem to turn more upon the effect of absconding, or other improper conduct mentioned in the statute of that State, than they do upon the concealment. Indiana has a statute of limitations in criminal cases which precludes the accused party from availing himself of its benefits where he "conceals the fact of the crime." In construing that statute, the court held that the concealment must be the result of positive acts done by the accused, and calculated to prevent the discovery of the fact of the commission of the offense of which he stands charged. *Jones v. State*, 14 Ind. 120. And this rule was applied and followed in a civil case. *Stanley v. Stanton*, 36 Ind. 445.

A QUESTION of negligence, somewhat out of the usual run, arose in the case of *Evansville & T. H. R. Co. v. Crist*, 19 N. E. Rep. 310, decided by the Supreme Court of Indiana. There the complaint was that defendants had constructed its railroad upon a highway, and

had dug an excavation in the same and piled the dirt along the sides thereof, making embankments some nine feet high for a long distance, leaving no way for persons to pass along the highway except upon the embankment, with the railroad track between, and that the plaintiff was lawfully riding along the highway, when defendant's agents approached in a hand car and frightened plaintiff's horse; that after seeing the dangerous situation in which plaintiff was placed, they failed to stop the hand car and thereby her horse was frightened and she was thrown off and greatly injured. The court says:

The two important facts to which we have referred—the place where the injury was received, and the duty of the appellant respecting the highway it had made unsafe—when assigned their due weight, fully and clearly relieve the plaintiff from any imputation of negligence, especially in this, when considered, as they must be, in connection with the explicit averment of her complaint that she was without fault or negligence. She was upon a public highway leading from her home, and there she had a right to be. She was, it is true, bound to exercise ordinary care in using the highway, but she was not bound to more. She was not crossing a railroad track, where the rights and duties of the company and a traveler are reciprocal; but she was upon a public way, which the company had no right to use in operating its road, or to make unsafe. The action is not, it is to be remembered, to recover for injuries received on a crossing, for the complaint proceeds upon a radically different theory. The cases of *Railway Co. v. Green*, 106 Ind. 279; *Railway Co. v. Hammock*, 113 Ind. 1; and *Railroad Co. v. Butler*, 103 Ind. 31—are not in point, for the reason that they were cases where the injury was received on a crossing, and not cases where the interference with a public highway, and a negligent breach of duty, caused the injury. Throughout this case this difference runs, exerting all through it a controlling influence. Here the defendant negligently failed to perform a duty imperatively enjoined upon it by positive law. The initial step in the defendant's wrong was the negligent violation of a mandatory statute, § 3903 of the Revised Statutes of 1881. This statute prescribes a plain duty. Indeed, the duty existed independent of the statute, but the statute makes it all the more clear and positive. The right to interfere with a highway is coupled with the duty to make it as safe as it was before it was disturbed, or at least to use reasonable care and skill to do so. This duty is violated if their is a failure to restore it to its former condition in all cases where the exercise of reasonable care and skill can effect a restoration. \* \* \* Our own cases recognize and enforce a rule very much the same as that stated by the author from whom we have quoted, although it is perhaps not quite so strongly stated. *Railroad Co. v. Stout*, 53 Ind. 143; *Railway Co. v. Phillips*, 112 Ind. 59; *Railroad Co. v. Carver*, 113 Ind. 51. In the case last cited it was said: "Leaving the highway in such a condition as to require the wheels of vehicles passing over the railroad track to be raised nine inches perpendicularly from the surface of the highway in order to pass over the top of the rails was *prima facie* a negligent interference with the free use thereof. *Railroad Co. v. State*, 37 Ind. 489;

*Johnson v. Railroad Co.*, 31 Minn. 283; *Railway Co. v. Locke*, 112 Ind. 404. The wrong of the defendant in negligently failing to restore the highway is, as we have seen, of itself sufficient to constitute a cause of action; and the additional act of negligence in the management of the hand car, if not considered as adding strength to the complaint, cannot, at all events, detract from it; but we think that the fact that the defendant, by its own wrong, rendered the highway unsafe, made it necessary for it, in operating its road, to exercise care to prevent injury to one placed in danger by that wrong. We are not dealing with a case where the railroad company was not guilty of any breach of duty respecting the highway on which the plaintiff was traveling, but with a case where, in violation of a positive duty, it wrongfully interfered with a highway. Here the two wrongs blend in one concurring tort. If the appellant was free from fault respecting the public highway, we add, to prevent possible misunderstanding, we should have an entirely different case, and one in which it may be that no action would lie.

THE Supreme Court of South Carolina, in the case of *State v. Carroll*, 8 S. E. Rep. 433, had occasion to construe the law as to the proof required in prosecution for adultery under the statute which reads as follows:

"Adultery is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other, without living together, of a man and woman, when either is lawfully married to some other person."

Under this statute they say that adultery may be committed in either one of two ways: (1) Where a man and woman, one of whom is married to another person, live together in carnal intercourse; (2) where, not living together, they indulge in habitual carnal intercourse—and the indictment in this case falls under the second head. It will be observed that the statute does not undertake to define either the word "habitual" or the word "carnal," and their meaning must be determined by the common sense of mankind; and in the absence of any statutory definition, it would be very difficult, if not absolutely impossible, to define, with any greater precision, the terms "habitual carnal intercourse" than was done by the circuit judge in this case—that it must be frequent, and not occasional; but how frequent to make it habitual must be left to the common sense of the jury. What are the habits of a person must necessarily be a question of fact. For example, where the question is whether a person is habitually intemperate, or whether he is a person of temperate habits, is mainly a question of fact, and is not susceptible of

being defined with precision as matter of law. As was said by Mr. Justice Field, in *Insurance Co. v. Foley*, 105 U. S. 354: "When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency, from frequent repetition of the same acts;" but neither he nor any other judge, so far as we know, has ever undertaken to say how frequently the act in question must be repeated in order to generate a habit of doing such act.

THE Supreme Court of New Jersey, in *Chism v. Schipper*, 16 Atl. Rep. 316, has lately decided a question of arbitration and award which is certainly novel, and in regard to which the court says at the outset: "The question to be decided is, can the defendant cheat the plaintiff by due course of law?" Though the conclusion is that he cannot, the opinion evinces considerable effort to find law and precedent justifying this invasion of the rights of New Jersey citizens and the dissenting opinion of Judge Magie is an ingenious argument, apparently supported by authority, in favor of the affirmative. The case was this: Suit on a building contract wherein the plaintiff agreed to erect and finish a dwelling house to the satisfaction of a certain architect, to be testified to by a writing or certificate, under the hand of said architect, that any alterations or additions were to be deducted from or added to the contract price; that in case of a dispute as to the construction or the specifications, the said architect was to decide the same, whose decisions should be final and conclusive. Full performance by plaintiff and also allegations of work and labor beyond the specifications. The breach is that the architect wilfully and fraudulently decides that certain alterations and additions are within the true construction of said specifications, and that plaintiff is not entitled to be paid the fair and reasonable value thereof, and fraudulently and wilfully refuses to sign the certificate required by the contract. To this defendant demurs, thus placing the matter before the court: "I admit that this money is due for additional work; I admit that the architect fraudulently certifies to the contrary; and I claim that, by a correct application of legal principles, I have the right to take advantage of

this fraud, and to appropriate to myself the moneys that are its fruits." The court says:

The inquiry is, does the law, in reality, justify this immoral attitude? It should be premised to the inquiry that, if this action will not lie, neither will any action lie against the defendant founded on the facts stated, either at law or in equity. As such a result would be one much to be deprecated, and would stand as a blot on the jurisprudence of the State, it would seem that the most cogent reasons should be forthcoming to afford a satisfactory answer to the interrogatory, why should a man be permitted to take advantage of the fraud of another? The only known reply is that the plaintiff has covenanted to that effect; that he has agreed that the action of the architect, whether honest or dishonest, shall be conclusive. It is proper to say, *in limine*, that it is not by any means deemed certain that this contract, if to be read in the sense just specified, is sustainable in law. It is assumed that a man cannot contract that he himself may commit a fraud. For example, this defendant could not have agreed that this money should not be payable except on his own written certificate, and that he might fraudulently withhold such certificate. If such a stipulation would, as it is thought, be expunged from the instrument on grounds of public policy, how can the party legally stipulate that another may commit this same crime for him? The capacity of parties to a contract to provide that one or the other, as the case turns out, may be cheated, does not appear to be a faculty requisite in the transaction of any legitimate business; while, at the same time, its existence is palpably offensive to good morals, and consequently may well be said to be adverse to the public welfare. The consequence is that it is, in my opinion, doubtful whether such an agreement can be legally made; but it is not deemed necessary to pursue the inquiry, inasmuch as, by proper rules of construction, applied to the facts set forth in this record, the proper conclusion is that the contract existing between these parties does not contain this stipulation so highly questionable. The inquiry is, what did these parties mean? Did they intend, or, by reason of the language employed, must it be concluded *de jure* that they intended to be bound by the award of the architect, even though such award was the creature of fraud? The clause thus referred to is in the common form that has long been in frequent use, and yet it may be safely said that it is most improbable that it would have been adopted in a single instance, if it had expressed in plain terms the meaning that it is contended lies latent in its expressions. It is hard to believe that any self-respecting man would put his name to an agreement that a third party might do in his favor a fraudulent act. But the adverse argument is that the agreement of the parties is to be ascertained from the plain language used by them, and such agreement is to be enforced, no matter what the intention may have been. This is the general rule, beyond a doubt, but such required literalism is not to be pushed to the preposterous length of requiring that by its operation the general intention of the parties, as evidenced by their contract itself, shall be frustrated or perverted, either in whole or in part. The terms employed are servants, and not masters, of a perspicuous intent: they are to be interpreted so as to subserve, and not to subvert, such intent. As an illustration, it plainly appears on the face of this instrument that it was the evident and sole purpose of the provision in question to provide for fair and definite decision of certain matters; and it is not said that by force of the terms

used, the decider is empowered to cheat either party at will; and yet it is obvious that the existence of such a power in the agent has no tendency to effectuate the object in view, but, so far as it can operate, is destructive of it. The stipulation giving the quality of finality to the action of their agent is part of a contrivance of these parties to insure fair dealing between them in certain particulars, there seems to be no reason why they should impart to such a contrivance a fraudulent potency. It was quite reasonable for these parties to say to their agent, decide honestly between us, and your decision shall be final; but it was utterly unreasonable for them to agree to abide by such award, if it were fraudulent. For my own part, I do not believe that in the history of the human race the transaction has occurred in which a man has consciously agreed that another should be clothed with the power to cheat him, and that the decision of the fraud-doer should be conclusive on the subject; and in the present instance such a stipulation can be constructed only by an abstract interpretation of the conventional terms; for if such language be construed as a part of an integer, and in the view of purpose in hand, it can be made to produce no such result. There is no more important rule of construction than that which requires that words shall be interpreted in the reflected light of the context in which they are found; and, applying this rule to the case in hand, it is not perceived how it can be reasonably said that these parties have given to the provision in question that noxious efficacy that is sought to be imparted to it. That the clause under discussion cannot be, out and out, construed literally, appears to be undeniable. This and similar engagements are never so read. Undoubtedly, if we construe these terms with entire literalness, the builder is required to produce, before he can claim the money due him, the certificate of the architect. There are no exceptions provided for nor indicated, if the language is thus alone regarded. But suppose the money be earned, and the architect die before the signing of the certificate, is the claim lost or forfeited? Such a result, it is presumed, would not be claimed; and yet it is avoidable only in one way, and that is, to construe the terms of the contract reasonably, as applied to their subject, and not literally. The exception can stand on no other ground than this, for the maxim, *actus Dei neminem facit injuriam*, is never applied in violation of a contract. Looking to the letter alone, these parties have said that under all possible circumstances the certificate shall be a condition precedent to the right to payment. Admitting this as the true construction, the impossibility of the performance of such condition would not avoid it; and that such an effect has never been judicially given to such provisions shows conclusively that they have been interpreted according to their spirit, and not in subservience to their very letter. And, indeed, in my view, the entire legal course that has been pursued in the construction of submissions to arbitration in the common-law, form, can be explained only on the ground that they have been construed liberally, and not with literal narrowness. In all these submissions the stipulation is in the most unqualified form that the award shall be final and conclusive, but, if such award be tainted with fraud, it is set aside on the application of the party; and yet it is plain that such party could not be permitted to make such application, if his submission is to be read by its letter, and thus made to mean an engagement on his part to abide by the award, whether honest or dishonest. In such cases it has never been pretended that the parties, by the terms of their sub-

mission, reasonably understood, meant anything of the kind. The grounds of decision in that entire class of cases would seem to be precisely applicable to the present case. As another illustration of the principle that a literal interpretation is out of place, when its adoption will run counter to the expressed general object of the contract, reference may be made to the familiar case of clauses so frequent in leases, that if the rent is in arrear for a certain time the instrument shall become void. In all these instances the courts have declared, notwithstanding the literal meaning of the terms, that the lease, on the happening of the event, is not absolutely vacated, but only becomes voidable at the option of the lessor. In looking to the authorities, I do not find that the point in question has ever been put under the consideration of any of the courts of this State. The subject was not discussed nor considered in any of the three cases cited in the brief of the counsel of the defendant in the decision of which I participated. With respect to the English law touching this topic, I am inclined to think that it is still in a fluent condition, and that the last word in reference to it has not yet been spoken. See *Clarke v. Watson*, 18 C. B. (N. S.) 278; *Milner v. Field*, 5 Exch. 829; *Battenbury v. Vyse*, 2 Hurl. & C. 41; *Pawley v. Turnbull*, 7 Jur. (N. S.) 792. The matter has been more definitely treated by the American tribunals, and the results reached seem to be very generally in accord with the views propounded in this opinion. *Railroad Co. v. Polly*, 14 Grat. 447; *Lynn v. Railroad Co.*, 60 Md. 404; *Herriek v. Belknap*, 27 Vt. 678; *Snell v. Brown*, 71 Ill. 133; *Wyckoff v. Meyers*, 44 N. Y. 143; *Thomas v. Fleury*, 26 N. Y. 26; *Bank v. Mayor*, 63 N. Y. 336; *Martin v. Leggett*, 4 E. D. Smith, 255. In *Batchelor v. Kirkbridge*, 26 Fed. Rep. 899, the question present in this case was put directly in question, and was pointedly decided, for the inquiry was whether the plaintiff was dispensed from producing a certificate, if it had been refused by the fraud of the arbitrator without collusion with the defendant. The jury was instructed at the trial by Mr. Justice Bradley that, if such fraud was shown, the plaintiff was entitled to recover, and that ruling was upon reconsideration declared to be right, both by the distinguished judge before whom the case had been tried, and by his associate, Mr. Judge Nixon. This case in itself is of great weight, and appears to be supported by the general current of American authority. Nor does it seem to me that by the adoption of the foregoing theory of exposition these arbitration clauses will be shorn of any beneficial efficacy. The awards authorized by them will, for all useful purposes, be in truth finalities. They cannot be impeached for the want of skill or knowledge of the arbiter, nor on the ground that his judgments do not square with the judgments of other persons, such awards can be vitiated by fraud alone, which must be proved to the satisfaction of a jury, under a watchful, judicial supervision. In fine, it appears to me that the foregoing construction of the clause of the contract in question rests upon the triple ground of legal principle, authority and public policy. I think on this issue the plaintiff should have judgment.

## RIGHTS OF THE CHEROKEE NATION.

1. Title of Cherokee Nation to its Lands.
2. Criminal Jurisdiction of the United States over the Cherokees and White Men.
3. Civil Jurisdiction Among the Cherokees.

1. *Title of Cherokee Nation to its Lands.*—

The public at large and the newspapers are almost as ignorant of the title by which the Cherokee Nation of Indians hold their land as are the members of congress so vehemently pushing the so-called Oklahoma bill. It is pertinent, therefore, to inquire into this title.

Early in this century, the Cherokees occupied a large country lying in the States of Tennessee, Georgia and Alabama. They had lived there time out of mind; but their presence had become obnoxious to the white inhabitants, and in accordance with the persistent appeals of the latter, a treaty was, in 1828, negotiated, whereby the Indians agreed to exchange their lands for seven million of acres just west of Northern Arkansas, and also for what is known as the "outlet."<sup>1</sup> The preamble of this treaty reads: "Whereas," \* \* \* the United States being anxious to secure to the Cherokees "a permanent home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a State or territory, etc." The treaty then agrees to give them the seven million acres, part of which they now occupy; and, moreover, the "United States guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States and their right of soil extend."<sup>2</sup>

This treaty was solemnly renewed in 1833, again in 1835, and yet again in 1846.

<sup>1</sup> Revision of Indian Treaties, pp. 57, 58. This "outlet" lies just south of Kansas, east of no man's land, and the panhandle of Texas, north of the Cheyenne and Arapahoe reservation, and Oklahoma proper, and west of the Creek country. It contains a little more than 6,000,000 acres.

<sup>2</sup> Of this large tract no man's land was afterwards sold by the Cherokees to the United States, a large part to the Creeks, and smaller tracts to the Nez Percés, Pottawattamies, and other tribes, leaving what is known as the "outlet" or "strip," and upwards of 4,000,000 acres actually occupied by the tribe.

In the treaty of 1835 the United States agreed that the lands theretofore ceded, "including the outlet, \* \* \* shall all be included in one patent executed to the Cherokee Nation, \* \* \*." In pursuance of this last treaty, and in 1838, the United States executed to the Cherokee Nation a patent, which recites first the various treaties already made, then describes seven million acres of land in the eastern end of the Indian Territory, also the "outlet" (*both by metes and bounds*), then reserves certain minor rights to the United States, such as military reservations, post roads, etc., and continues: "Therefore, in execution of the agreements, \* \* \* the United States have *given and granted*, and by these presents do *give and grant* unto the said Cherokee Nation (the land described), TO HAVE AND TO HOLD THE SAME, together with all the rights, etc., to the said CHEROKEE NATION FOREVER." The patent then concludes by subjecting the land to certain minor conditions, one only of which bears upon title.<sup>3</sup> That provision is that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct, or abandons the same."

Thus, we see that the title of the Cherokees to the outlet is the same as to their present actual home; by treaty they are guaranteed the *use* of the outlet, and by *patent*, the "outlet" is embraced indifferently with the eastern portion of their domain. Their title to the "outlet" is impliedly recognized by the provision (now repealed), that they must give title to certain portions thereof to "friendly Indians." Their title, therefore, is a base or determinable fee, vested in the Cherokee Nation, *Qua* Nation.

The "outlet" is now leased to a cattle syndicate for five years at an annual rental of \$200,000. The Oklahoma bill,<sup>4</sup> while on its face apparently complying with treaty provisions requiring consent to open up the "outlet," and providing for compensation to the Cherokees at \$1.25 per acre (as and when it shall be paid by settlers, and *less* cost of

<sup>3</sup> These conditions are: To permit Red men to gather salt on the "outlet;" to sell to friendly Indians portions of the "outlet;" that the trade and intercourse laws shall extend over the whole country granted, and finally, the reversion mentioned in the text.

<sup>4</sup> House bill 1,277, commonly known as the "Springer bill."

surveying),<sup>5</sup> nevertheless, contains this insidious provision (section 13), that any leases, except those for strictly "farming purposes, are hereby declared void and contrary to public policy." Observe the legal effect. The Cherokees are guaranteed the use of the "outlet" forever, but if they abandon it, it reverts to the United States. They can use it only by actual settlement thereon, or by letting it out to tenants. It is fitted practically only for grazing purposes. The Cherokees have grazing land enough to the east, and besides, their towns, their government, their interests are all in the east. The only profitable way they can use it is by leasing it as they now do. They gave full consideration for this land; they got their patent, and the rent pays the greater part of their governmental and school expenses. But, says this bill, "your lease is void." Then follows a reverter for non-user,<sup>6</sup> and the great restless American settler attains his end, he steals the Indian's land.

2. *Criminal Jurisdiction of United States Courts over Cherokees and White Men.*—In 1845, it was decided<sup>7</sup> that a murder by a white adopted citizen of an Indian by blood is cognizable only by the United States Courts.<sup>8</sup> Following this decision, and in accordance with its reasoning, the United States district court for the western district of Arkansas holds that the Cherokee courts have no jurisdiction over offenses committed by whites (whether adopted citizens, permitted persons or intruders),<sup>9</sup> nor over any

offense committed by a Cherokee by blood upon the person or property of a white. Thus, in the recent case of *United States v. Boudinot*, the defendant killed one Stone, a white adopted citizen. He was tried and acquitted at Fort Smith, Arkansas, before the United States district court.

This is really a great hardship, for these Indians have a very complete system of laws, which are as well administered in their own circuit, district and supreme courts as in the average country circuit in the west.<sup>10</sup> The trial of a Cherokee before an Arkansas jury is certainly not a trial by a jury of his peers or of the vicinage; but as was said in *United States v. Kagama*,<sup>11</sup> a trial often before "their deadliest enemies." The objection that no intelligent jurors can be found in the nation is not well taken; for the census of 1880 shows in Arkansas: population, 802,525, schools, 2,768, number of pupils during the year, 108,236, a percentage of attendance of 13. The same year the Cherokees numbered 20,086, schools, 107, attendance, 9,291, a percentage of 46.<sup>12</sup>

This rule, as to jurisdiction, produces a curious anomaly. The trade and intercourse laws cover comparatively few offenses, and as the United States courts have only the jurisdiction conferred by statute, there are necessarily many crimes not punishable by them. Thus, there are twenty-eight distinct grave offenses, defined and punishable by the Cherokee laws, which a white man may commit, and go unwhipt of justice. Among them are burglary, abortion, bribery, forgery, gambling, perjury and others. If a white man commit one of these offenses, and he be arrested by the Cherokee authorities, a writ of *habeas corpus* will at once issue from the United States court, and the Indian authori-

<sup>5</sup> The Cherokees have had a *bona fide* offer of \$3 per acre, but of course cannot accept, as they have no power to alienate.

<sup>6</sup> The conditions are such that no considerable portion could be actually occupied by the Cherokees without loss to them; and besides, their own laws would largely prevent such occupation.

<sup>7</sup> *United States v. Rogers*, 4 How. 567.

<sup>8</sup> A white person can become a citizen of the Cherokee nation only by marriage with one who has Cherokee blood.

<sup>9</sup> A word of explanation is necessary. There are three classes of whites in the Cherokee nation. First, mere intruders; second, permitted persons, and these are generally tenant farmers, who cultivate on shares with Cherokee owners, and are allowed to do so on payment of fifty cents per month; and third, white adopted citizens. These last become citizens by virtue of marriage. The Cherokees preserve intact the archaic idea of adoption, as described by Sir Henry Maine in his "ancient law." The bond of union is a substantial one, and the person adopted is still conceived, for all purposes, as of the real blood of the tribe. Until of late years there were seven clans of the tribe, and

so close was this blood tie that the adopted citizen, equally with his Red brother, was forbidden to intermarry in his own clan.

<sup>10</sup> I was amazed at the first trial I saw, at the dignity preserved, the care with which the case had been prepared, the ready objections of counsel, and the soundness of the judge's rulings on points of evidence. We might, indeed, learn something from them; for a majority of a jury renders a civil verdict, the unanimous rule obtaining only in criminal cases.

<sup>11</sup> 118 U. S. 375, 384.

<sup>12</sup> All instruction is in the English language. Many full blood Cherokees do not understand their old language, and it is the exception to meet a person in that country who does not speak English.

ties are compelled to discharge the prisoner.<sup>13</sup>

In view of this state of affairs, the reasoning upon which Taney, C. J., bases his decision in the Rogers case (*supra*), reads queerly. He says: "It can hardly be supposed that congress intended to grant such exemptions (*i. e.*, from federal jurisdiction), to men of that class who are liable to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country." "*Most mischievous and dangerous*," and yet the United States say to the Cherokees, "you have adopted them, you shall not expel them; but they may commit any one of this long list of crimes with impunity." There is no doubt that the decision was meant to protect the Indian, but no more ingenious device could have been conceived to work the opposite result.

Elsewhere, it is said in the opinion, that it is not supposable that the United States would allow its citizens to throw off allegiance and become identified with an Indian tribe, though in the treaty of 1785, art. 5,<sup>14</sup> and again in the treaty of 1792, art. 8,<sup>15</sup> it is expressly provided that, "if any citizens of the United States, or person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States; and the Cherokees may punish him or not as they please." This provision has never been repealed by subsequent treaty or legislation. The case, however, was apparently not argued for the defense, and the above treaties were not cited to the court.

The true rule deducible from all the treaties, the provisions of which are too lengthy to be set out here, would seem to be that an adopted white citizen should for all purposes of criminal jurisdiction be considered as if he were a Cherokee born. That is to say, Cherokee citizens, native or adopted, for crimes *inter sese*, are properly punishable only by Cherokee courts, while for crimes against the United States (as *e. g.*, robbing United States

<sup>13</sup> I personally knew of the cases of Lewis and Markham, the former a white adopted citizen, the latter a half blood, who were convicted by the Cherokee courts for wrongfully cutting and shipping walnut timber from the public domain. They were sentenced to pay \$1,000 each, and to be imprisoned until payment. Lewis was about to sue out his writ, when the chief pardoned both. Only Markham could have been punished, and the chief thought it unfair for him to suffer and Lewis to go free.

<sup>14</sup> Revision of Indian treaties, p. 26.

<sup>15</sup> *Id.* p. 29.

mail), they should be amenable just to the extent of a citizen of any State. The Boudinot case (*supra*), had defendant been convicted, would have gone to the Supreme Court of the United States, and it is believed that the Rogers' case would have there been overruled.

The United States guarantee to keep all unauthorized persons out of the Cherokee Nation, and the Indians themselves are authorized to arrest all such, disarm them and turn them over to the United States authorities.

### 3. Civil Jurisdiction Among the Cherokees.

—The white adopted citizen has the same standing before the nation's courts as the Cherokee by blood, but no intruder or permitted person can sue there;<sup>16</sup> nor have the United States courts any jurisdiction over any civil controversies which may arise within the nation. A non-citizen may be a witness in the Cherokee courts, and failure to obey process will subject him to expulsion as an intruder.<sup>17</sup>

A curious question arises as to how these Indians are to obtain redress in the courts in case the United States infringe upon their treaty rights. "There must be refuge," yet the supreme court have held that the Cherokee Nation cannot sue in their capacity of nation.<sup>18</sup>

The instance of the Oklahoma bill is in point. The taking of the outlet from the Cherokees can hardly be justified under the right of eminent domain, and if, therefore, the Indians have a title in fee thereto, the taking must be beyond the powers of the United States. How can the Cherokees assert their rights in the premises? Probably there would lie a bill in equity with a number of individual Indians as parties plaintiff, stating it was intended to join all the members of the tribe, but further enumeration was omitted because of the number involved; something similar to the bill by numerous parties plaintiff where the interest is common to all.

FRANK P. BLAIR.

<sup>16</sup> Compiled Laws Cherokee nation, p. 297, § 126.

<sup>17</sup> Compiled Laws Cherokee nation, p. 118, § 106. As the Cherokee courts cannot punish such citizen for perjury, his testimony is but lightly regarded.

<sup>18</sup> The Cherokee Nation v. Georgia, 5 Pet. 1. In this case Mr. C. J. Marshall delivered the opinion of the court, Mr. Justice Johnson concurred "as a legal question," not as a question of morality. Mr. Justice Baldwin concurred in dismissing the bill. Mr. Justice Thompson dissented, and with him Mr. Justice Story.

BONDS — ADMISSIONS AND DECLARATIONS —  
ALTERATION OF WRITTEN INSTRUMENTS  
— BURDEN OF PROOF.

HODNETT V. PACE.

*Supreme Court of Appeals of Virginia, May 3, 1888.*

1. *Bonds—Admissions and Declarations of Parties Thereto—Hearsay.*—An admission or declaration made by a party to a bond, to a third person, in the absence of another named therein, as to the transfer or satisfaction of the same, is hearsay and inadmissible.

2. *Alteration of Written Instruments—Burden of Proof.*—In case of the alteration of a written instrument, the burden of proof is on the party offering it to explain the same.

FAUNTLEROY, J., delivered the opinion of the court:

The petition of Narcissa Hodnett, administratrix, etc., of M. B. Hodnett, deceased, represents that she is aggrieved by a judgment of the corporation court of Danville, Va., rendered at its April term, 1887, in an action of debt, wherein John R. Pace, administrator of G. T. Pace, deceased, suing for the benefit of James R. McCully, administrator *d. b. n.* with the will annexed of Charles Lucas, deceased, is plaintiff, and Narcissa Hodnett, administratrix, etc., of M. B. Hodnett, deceased, is defendant. The plaintiff sued out of the clerk's office of the circuit court of Pittsylvania county, on the 9th day of July, 1881, a summon against M. B. Hodnett, surviving obligor of himself and John M. Sutherlin, deceased, in a plea of debt for \$241.25, with interest thereon from the 18th day of October, 1853, till paid. To the declaration, the defendant, M. B. Hodnett, demurred, and thereupon, by consent of the parties, the case was removed from the circuit court of Pittsylvania county to the corporation court of the town of Danville, in which latter court it was duly docketed, and continued from term to term until the death of the defendant, M. B. Hodnett, whereupon it was revived against the appellant as administratrix of the said M. B. Hodnett, deceased, and was again continued from term to term until April term, 1887, when the appellant withdrew the demurrer filed by M. B. Hodnett in 1881, and filed three pleas, viz., *non est factum*, payment, and the statute of limitations; on which pleas issues were joined, a jury impaneled, and a trial had, resulting in a verdict for the plaintiff against the appellant for \$241.25, with interest from October 18, 1853; upon which verdict, the court, overruling defendant's motion to set aside the same, entered the judgment complained of against the appellant, as administratrix aforesaid.

In the progress of the trial, appellant excepted to sundry rulings and instructions of the court, and also excepted to the action of the court in overruling her motion for a new trial. The first error assigned is that the court admitted the witness George C. Cabell to state to the jury, against the objection of the defendant, conversations alleged to have been had with G. T. Pace, deceased,

the payee in the bond sued on, in relation to the said bond, not in the presence of the obligors in the said bond, or either of them, or their personal representatives. We are of opinion that this assignment of error is well taken. The statements of this witness of what G. T. Pace, deceased, said to him, seven years previously, disclaiming any interest in the bond sued on, and that he had transferred it to Charles Lucas, then deceased, was purely hearsay evidence, and wholly incompetent. The question of the admissibility of such testimony has been frequently decided adversely to the parties offering it. *Paige v. Cagwin*, 7 Hill, 361; *Alexander v. Mahon*, 11 Johns. 185; *Kent v. Walton*, 7 Wend. 256; *Hurd v. West*, 7 Cow. 752; *Whitaker v. Brown*, 8 Wend. 490; *Beach v. Wise*, 1 Hill, 612. In his notes on the case of *Paige v. Cagwin*, as reported in 42 Am. Dec. at page 80, Freeman says: "Declarations by a former owner of a chattel or chose in action, made after parting with his interest, are of course inadmissible. *Christie v. Bishop*, 1 Barb. Ch. 115; *Peek v. Crouse*, 46 Barb. 156; *Smith v. Ins. Co.*, 8 Jones & S. 500. And as declarations of a former owner are inadmissible against the title of a subsequent purchaser for value, so are they inadmissible to prove that title. *Worrall v. Parmelee*, 1 N. Y. 521." In the case last cited the court below admitted the declarations of a former owner to prove property in the defendant, and on this error alone was reversed; the court saying by Jewett, C. J.: "The decision of the justice upon the objection taken to the admissibility of the evidence of Brown's declarations was clearly erroneous. Such evidence is nothing more than hearsay." The record in this case shows that the bond sued on was not assigned in writing to Lucas, and there is no evidence of property therein or title thereto in Lucas, or his administrator, except the incompetent testimony of the witness George C. Cabell, offered seven years after the death of G. T. Pace, the payee in the bond, that said Pace had told him that he had no interest in the bond, but had transferred it to Charles Lucas, then deceased. Charles Lucas died some time before July 12, 1866, as is shown by the order of the court appointing appraisers of his estate, one of whom was G. T. Pace, to whom the bond sued on was given, and which said appraisers returned an inventory and appraisal of said Charles Lucas' estate, signed by themselves and by his administrator, in which inventory and appraisal no mention is made of the bond sued on. Its first appearance, according to the testimony of George C. Cabell, was when it was brought to him by Lucas' administrator, or by some member of his family, he does not know which, nor exactly when, but he believes in 1868; and, after remaining some time in his hands, it was placed by him, in 1871, in the hands of Commissioner Moseley among the papers of the suit of *Sutherlin v. Lucas' Admr.*, where it remained for some years, and until 1881, when this suit was brought on it at the insistence of Elisha Barksdale, Jr., attorney for

one Soyars, who sought to have a settlement of the accounts of J. R. McCully, administrator of Lucas in the suit of Sutherlin v. Lucas' Admr. G. T. Pace, the payee in the bond, refused steadily, as long as he lived, to permit suit to be brought upon the bond in his name, and after his death his administrator allowed the suit to be brought in his name, upon being indemnified against costs, etc. The suit was not brought until long after the death of John M. Sutherlin and G. T. Pace, the principals as debtor and creditor in the bond; and even then it was permitted to sleep on the docket, without a trial, or effort for a trial, for nearly six years, and until the death of the surety in the bond, M. B. Hodnett, had taken away the last party and living witness to the transaction—thirty-four years after the bond fell due. And the court upon the trial, admitted the testimony of the said witness, George C. Cabell, as to the admissions of John M. Sutherlin, the principal obligor in the bond, as evidence against the defendant, administratrix of M. B. Hodnett, deceased, surety in the said bond; it being admitted that the alleged admissions of John M. Sutherlin were made, if at all, in the absence of M. B. Hodnett, the surety. This was error. *Lewis v. Woodworth*, 2 N. Y. 512; *Shoemaker v. Benedict*, 11 N. Y. 179.

Upon the trial it was shown that the date of the bond has been changed or altered from 1852 to 1853. The face of the bond shows the alteration, and the uncontradicted testimony of the expert witness W. E. Boisseau is that it had been plainly changed from 1852 to 1853. If of the original date, 1852, the statute of limitations barred the action thereon. For this alteration of the date of the bond, palpable upon its face, and expressly proved withal, the plaintiff offered no explanation whatever, nor introduced one word of evidence in relation thereto. But the instructions given by the court to the jury were erroneous, and a new trial should have been awarded, because of the misdirection of the jury. In the three instructions given by the court at the request of the plaintiff, the jury were told that in the case before them, in which the defendant, upon her plea of *non est factum*, relied upon a palpable and undenied alteration of the instrument sued on—a change in its date so as to bring it within the period of limitations—it was the defendant's duty to satisfy them by evidence that the said alteration was made without her consent, or that of her intestate, and was not made at the time of the execution of the bond; and that, unless this was done, it was a presumption of law, by which the jury was bound, that the alteration was contemporaneous with the execution of the bond, and was made with the defendant's consent, and rendered her liable to judgment. The third and last instruction given by the court is in these words: "The court instructs the jury that if they believe from the evidence the bond in question has been altered, that, in the absence of other evidence, the presumption of law is that the alteration was made at the time

the bond was executed; and, further, that every alteration on the face of a written instrument detracts from its credit, and renders its suspicious, and this suspicion the party claiming under it must explain to the jury by satisfactory evidence." This instruction, if not (as it is) grossly self-contradictory and erroneous, is wholly ambiguous, and calculated both to misdirect and confuse the jury. The true and well established rule of fundamental law and justice is directly to the contrary. In his note to the case of *Woodworth v. Bank*, 19 Johns. 391, reported 10 Am. Dec. 239, Freeman says: "There is a presumption of fact that an alteration was made after execution; but it will be generally a question for the jury to determine whether the alteration was made before or after the execution." 1 Greenl. Ev. § 564, says: "If, on the production of the instrument, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious; and this suspicion the party claiming under it is bound to remove." "But, if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom and the intent with which the alteration was made, as matters of fact to be ultimately found by the jury upon the proofs to be adduced by the party offering the instrument in evidence." *Priest v. Whitacre*, 78 Va. 151. And in the case of *Elgin v. Hall*, reported in April number Va. Law J. 1886, p. 231, Lacy, J., speaking for this court, says: "We have no occasion to go into speculation, however, as to the cause or agent of these changes, made in the interest of the defendant, who offers in evidence these papers to prove the payment of money by him. The rule of law is that he must explain these things (which he has not attempted to do), or he must lose all benefit, taking nothing on account of them." No evidence is offered in explanation of the alteration upon the face of the bond sued on, thirty-four years after it became due, without which alteration it would be barred by the statute. No proper evidence is offered of Lucas' title to or interest in the bond. No explanation of the failure of Lucas to sue in his life-time upon this bond (if in truth he had any right or title in or to the bond), although the proof is that he was, for years previous to his death, pressed for money, and lived all his life in the immediate vicinity of Hodnett, the surety, and of John M. Sutherlin, the principal obligor on the bond, one of whom was rich, and the other well to do, and prompt to pay his debts; and with Hodnett's estate, after his death, under administration.

Both upon the facts and the law of this case, the judgment of the corporation court of Danville complained of is wholly erroneous, and must be reversed and annulled, and the cause will be remanded to the said corporation court for further

proceedings in accordance with this opinion. Reversed.

**NOTE.—Hearsay Evidence—Admissions and Declarations**—As has been well said by a leading text-writer "verbal admissions ought to be received with great caution; the evidence consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party actually did say."<sup>1</sup>

"Whenever a witness states that of which he is not personally cognizant, but has derived from some third person his testimony, is clearly hearsay and not ordinarily admissible."<sup>2</sup>

Thus, it is not competent for one member of a family to testify as to what another member of the same family, who is dead, told him a certain family portrait cost.<sup>3</sup> Nor for one member of a firm to testify as to what another member of the firm told him the latter paid for certain goods purchased by him for the firm.<sup>4</sup> And in an action for the conversion of property against an officer who took it under process, as the property of a person in whose possession it was found, it is not competent for the plaintiff, in order to establish his title to the property, to show that such person had stated to others that he borrowed the property of the plaintiff.<sup>5</sup> Neither are confessions of the principal debtor, made in the absence of a surety, evidence against the surety.<sup>6</sup> And it was held in a late case that admissions made nine years before, by defendant's testator, could not be received in evidence to disturb a written contract to which he was a party.<sup>7</sup>

**Admissions of Principal as Against Surety—Res Gestæ.**—A surety is bound by the declarations of the principal, when made during the transaction of the business for which the surety was bound, and with reference thereto. All other declarations made subsequent to the act to which they relate, must be excluded.<sup>8</sup>

**Alteration of Written Instruments.**—A material alteration of a written instrument is "any act done upon the instrument by which its meaning or language is changed."<sup>9</sup> It has been held, in Pennsylvania, that sureties on a builder's indemnity bond are discharged by a material change in the building contract without their consent.<sup>10</sup> And in California, that the sureties on a bond for the faithful performance of the duties of an agent, are released from liability, if the principal, without the sureties' knowledge, materially alters the terms of the contract, or if the principal continues

to employ the agent after knowledge that he has misappropriated money coming into his hands as agent.<sup>11</sup> And, in Washington Territory, that a bond, altered after being sealed, without the consent of the sureties, may be repudiated by them.<sup>12</sup> In another case, where, after a distiller's bond had been signed by two sureties, with the understanding between them and the obligor and obligee, that it was to be signed also by one Hugh P. Reynolds, whose name was in the bond, and of his name, with the knowledge of the obligee, was substituted that of John B. Reynolds, who then signed the bond, it was held that the two other sureties were discharged.<sup>13</sup> But we find it laid down in a Missouri case, that the increase of the capital stock of a bank will not discharge the sureties on the cashier's bond.<sup>14</sup>

It is well settled that where the alteration is not a material one, and does not change the contract in such a manner as to place the surety in a different position than was first contemplated, such alteration will furnish him with no defense in case of suit.<sup>15</sup> And furthermore, a bond altered in a material part, and declared upon as altered, is admissible in evidence without explaining the alteration, unless there is a sworn plea of *non est factum*, or some plea denying on oath that the alteration was made with the consent or by authority of the makers of the instrument.<sup>16</sup>

**Burden of Proof.**—If any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which, the alteration was made, as matters of fact to be ultimately found by the jury upon proofs to be adduced by the party offering the instrument in evidence.<sup>17</sup>

<sup>11</sup> *Roberts v. Donovan*, 70 Cal. 108.

<sup>12</sup> *Walla Walla County v. Puig*, 1 Wash. Ter. 339.

<sup>13</sup> *United States v. O'Neill*, 19 Fed. Rep. 567.

<sup>14</sup> *Lionberger v. Krieger*, 58 Mo. 160.

<sup>15</sup> *Claiborne v. Birge*, 42 Tex. 98; *Roach v. Simmons*, 20 Wall. 165; *Amlcable Life Ins. Co. v. Sedgwick*, 110 Mass. 163; *Gardiner v. Harbick*, 21 Ill. 129.

<sup>16</sup> *Thompson v. Gowan*, 3 S. E. Rep. 910.

<sup>17</sup> 1 Greenl. on Ev. § 564; 1 Am. & Eng. Ency. of Law, 512, citing *Stahl v. Berger*, 10 S. & R. (Penn.) 170; s. c., 13 Am. Dec. 666; *Stephens v. Graham*, 7 S. & R. (Penn.) 506; s. c., 10 Am. Dec. 485; *Bowers v. Jewell*, 2 N. H. 543; *Steele v. Spencers* 1 Pet. (U. S.) 552; *State v. Dean*, 40 Mo. 464; *Keen's Exr. v. Monroe*, 75 Va. 424; *Jones v. Alley*, 4 Iowa, 181; *Oliver v. Hawley*, 5 Neb. 439; *Huston v. Plato*, 3 Colo. 42; *Overton v. Matthews*, 32 Ark. 147; *Rogers v. Vosburgh*, 87 N. Y. 228; *Cass Co. Bank v. Morrison*, 17 Neb. 341; s. c. 52 Am. Rep. 417; *Briscoe v. Reynolds*, 51 Iowa, 673; *Palmer v. Sargent*, 5 Neb. 233; s. c., 25 Am. Rep. 476; *Haynes v. Haynes*, 33 Ohio St. 598; *Newell v. Mayberry*, 3 Leigh (Va.) 250; *Ramsey v. McCue*, 21 Gratt. (Va.) 349. And see *Western Bldg. Assn. v. Fitzmaurice*, 9 Cent. L. J. 169; *Suffell v. Bank of England*, 13 Cent. L. J. 455; "Alteration of Written Instruments," 15 Cent. L. J. 62.

<sup>1</sup> 1 Greenl. on Ev. § 290.

<sup>2</sup> Wood's Prac. Ev. 248.

<sup>3</sup> *Houston, etc. R. Co. v. Burke*, 55 Tex. 323.

<sup>4</sup> *Williamson v. Dillon*, 1 H. & G. (Md.) 444.

<sup>5</sup> *King v. Frost*, 28 Minn. 417.

<sup>6</sup> *Boston Nat. Mfg. Co. v. Messenger*, 2 Pick. 223; *Dexter v. Clemens*, 17 Pick. 175.

<sup>7</sup> *Hewitt v. Lewis*, 13 Wash. L. Rep. 322.

<sup>8</sup> See 1 Greenl. on Ev. § 187, and the following cases cited therein: *Lee v. Brown*, 21 Kan. 458; *Ballard v. Railroad Co.*, 7 Bush (Ky.) 597; *White v. Ger. Nat. Bank*, 9 Heisk. (Tenn.) 475; *Hatch v. Elkins*, 65 N. Y. 489; *Tenth Nat. Bank v. Darragh*, 3 Thomp. & C. 138; *Chelmsford Co. v. Demarest*, 7 Gray 1; *Union Savings Assn. v. Edwards*, 47 Mo. 445; *Chapel v. Washburn*, 11 Ind. 333.

<sup>9</sup> 1 Greenl. on Ev. § 566.

<sup>10</sup> *Whelan v. Boyd*, 114 Pa. St. 228.

## QUERIES AND ANSWERS.

### QUERY NO. 9.

Sentence cannot be passed at once, unless time is waived by defendant. The justice's docket does not show waiver of time in a case of misdemeanor where defendant pleads guilty. On writ of *habeas corpus*, the court held parol evidence inadmissible to prove the proceedings or that time was waived, and discharged defendant. Is the ground tenable? H.

## QUERY NO. 10.

A brings an action of replevin against B to recover certain goods and merchandise on the alleged ground that B purchased them of A upon fraudulent representations, and with the intention not to pay for them. A is defeated in the replevin suit, the alleged fraudulent representations and intention not being proven. Can A afterwards sue B in *assumpsit* for the purchase price or value of the goods, or is the judgment in the replevin case an estoppel? Losing the replevin suit must he lose his goods or the value of them? If A had first sued in *assumpsit*, he, of course, must thereby waive the tort, and his election of such remedy would conclude him. But by suing in tort first and failing, does it bar him from suing in *assumpsit*? Please cite authorities. H.

## QUERIES ANSWERED.

## QUERY NO. 7.

[To be found in Vol. 28, Cent. L. J., p. 142.]

B could assign his interest. *Nimms v. Davis*, 7 Tex. 26; *Fitzgerald v. Vestal*, 4 Sneed, 258; *Ridgeway v. Underwood*, 67 Ill. 415. No particular form of assignment is required. 1 *Walt's Act. & Def.* 363. If the assignment was made to defraud B's creditors and his assignee participated therein, or if the judgment was a lien, then D can obtain the money; otherwise B's assignee is entitled to it. B. J.

## RECENT PUBLICATIONS.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. III. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1888.

This volume contains much that is of interest and will be found as carefully prepared as its predecessors, of which we have frequently spoken in words of high praise. Of the important cases herein reported, we note many of special interest, notably, *Velsian v. Lewis*, 15 Oreg. 539, involving important questions of sale of chattels by one who had no right to sell, and connected therewith questions arising out of the possession and the doctrine of *caveat emptor*. Mr. Freeman's note to the case is very exhaustive. Another important case is *Spies v. People*, 122 Ill. 1—the anarchist case. This also is extensively annotated. A leading case on questions of the liability of stock and stockholders in corporations, is *Thompson v. Reno Sav. Bank*, 19 Nev. 103. The note to this case is equal to any text-book on the subject.

FEDERAL DECISIONS. Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the Opinions of those Courts from the Time of their Organization to the Present Date, together with Extracts from the Opinions of the Court of Claims and the Attorneys-General, and the Opinions of General Importance of the Territorial Courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XXIX. *Wages of Law—Wrongful Levy*—St. Louis, Mo.: The Gilbert Book Company. 1889.

We have had occasion so often to speak of this series

of reports, of which this is the twenty-ninth volume, that it seems almost unnecessary to do more than call the attention of the profession to the issue of this volume, and to say further that we regard the set as of inestimable value, especially to the federal practitioner. This volume contains 1007 pages and all federal cases from the organization of those courts to the present, which are included within the subjects from *Wages of Law to Wrongful Levy*. Herein may be found the adjudication on the subjects of war, including the special topics of blockade and contraband, confiscation of property, neutrality, captured prize, army and navy, the civil war, some of which are of interest, not only to the lawyer but to the student of history. It also includes writs and therein process generally, and attachment, garnishment, *habeas corpus*, *mandamus*.

## BOOKS RECEIVED.

THE AUSTRALIAN BALLOT SYSTEM, as Embodied in the Legislation of Various Countries, with an Historical Introduction. By John H. Wigmore, of the Boston Bar. Boston: Charles C. Soule. 1889.

A TREATISE ON THE LAW OF TRIALS IN ACTIONS, Civil and Criminal. By Seymour D. Thompson, LL.D., in Two Volumes. Chicago: T. H. Flood & Co. 1889.

THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, Compiled under the Editorial Supervision of John Houston Merrill, Late Editor of the American and English Railroad Cases, and the American and English Corporation Cases, Vols. 1, 2, 3, 4, 5 and 6. Northport, Long Island, N. Y.: Edward Thompson, Law Publisher. 1887, 1888.

AMERICAN AND ENGLISH CORPORATION CASES. A Collection of Corporation Cases, both Private and Municipal (Excepting Railway Cases), Decided in the Courts of Last Resort in the United States, England and Canada. Jas. M. Kerr, Editor, Wm. M. McKinney, Associate Editor, Vol. XXI. Northport, Long Island, N. Y.: Edward Thompson Co., Publishers.

THE AMERICAN AND ENGLISH RAILROAD CASES. A Collection of all the Railroad Cases in the Courts of Last Resort in America and England. Jas. M. Kerr, Editor, Wm. M. McKinney, Associate Editor, Vol. XXXIV. Northport, Long Island, N. Y.: Edward Thompson Co., Publishers.

1 Noticed in editorial column.

## JETSAM AND FLOTSAM.

A GOOD story is told of Mr. Justice Hannen. A demure, sombre-dressed jurymen in melancholy tones claimed exemption from serving, and his lordship asked, in kind and sympathetic tones, "On what ground?" "My Lord," said the applicant, "I am deeply interested in a funeral which takes place to-day, and am most anxious to follow." The reply was, "Certainly, your plea is a just one." Scarcely had the man departed before Mr. Justice Hannen learned that he was the undertaker.

Miss Gotham (to Mr. Wabash, recently returned from abroad)—I suppose you were at court while in London, Mr. Wabash?

Mr. Wabash (uneasily)—Well—er—yes, Miss Gotham, but only once, and then I got off with a merely nominal fine.

"We find," was the verdict of the Arizona coroner's jury in the case of the man who had been hanged for horse-stealing, "that the deceased came to his death from perfectly natural causes. He knew it was Jake Barnaby's horse."

## WEEKLY DIGEST

Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ALIMONY—Fraudulent Conveyance. — Although a claim for alimony is not a debt within the ordinary meaning of that term, yet it is a right which becomes vested with the right to divorce, and it can no more be defeated by a fraudulent conveyance than it could if it were fixed and certain in amount.—*Pickett v. Garrison*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 38.

2. ALTERATION OF INSTRUMENT—Bond. — Question upon the facts, as to whether there was alteration of bond of administrator, sufficient to avoid it.—*Kinard v. Glenn*, S. C. S. Car., Nov. 27, 1888; 8 S. E. Rep. 203.

3. APPEAL—Justice of Peace. — The fact that an appeal bond, on appeal from a justice, is executed and approved before rendition of the judgment appealed from, does not invalidate the bond.—*James v. Woods*, S. C. Miss., Nov. 5, 1888; 5 South. Rep. 106.

4. APPEAL—Reversal. — An order setting aside a verdict and granting a new trial will not be reversed, unless an abuse of discretion clearly appear.—*Halpin v. Nelson*, S. C. Iowa, Dec. 23, 1888; 41 N. W. Rep. 62.

5. APPEAL—Objections to Evidence. — Errors in the refusal of testimony on a trial will be considered as waived, unless complaint thereof be made in a motion for a new trial.—*Yates v. Kinney*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 128.

6. APPEAL—From Inferior Courts—Foreign Attachment—Discharge of Trustee. — Under Pub. Laws R. L. ch. 597, the plaintiff in an action begun by foreign attachment cannot appeal when the district court renders judgment in his favor, but discharges the trustee.—*Clapp v. Smith*, S. C. R. I., Dec. 6, 1888; 16 Atl. Rep. 246.

7. APPEAL—Justice of Peace. — Right to new trial of case before a justice where judgment was rendered in the absence of defendant.—*Howard v. Jay*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 148.

8. APPEAL—Bond. — An appeal bond is to be filed within 30 days from the date of the order or judgment appealed from, and no notice of an appeal is required.—*Mallick v. McDermot*, S. C. Neb., Dec. 14, 41 N. W. Rep. 187.

9. APPEAL—Presumption. — Where the abstract on appeal does not purport to set out all the record necessary to a review of the rulings, and the appellee denies that it shows all that occurred, it will be presumed that the rulings were correct.—*Brown v. Long*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 58.

10. APPEAL—Record. — Under Code Iowa, § 3179, the court cannot recognize the original papers except the testimony, nor that when only certified by the original certificate filed with the other papers.—*Cox v. Macy*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 28.

11. APPEAL—Practice—Record—Failure to Show Appeal. — It is no ground for dismissing an appeal that the record fails to show that any appeal was entered in the trial court, it being the clerk's duty to perfect the record with reference to the appeal.—*Allison v. Whittier*, S. C. N. Car., Dec. 18, 1888; 8 S. E. Rep. 338.

12. APPEAL—Jurisdiction—Mortgage. — A suit to foreclose a mortgage is not a case involving an interest in the property, within Code Iowa, § 3178, which provides that the limitation on appeals prescribed therein shall not apply to such cases.—*Brown v. Smith*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 27.

13. APPEAL—Interlocutory Order—Procedure. — Defendants, in a processioning proceeding, cannot appeal from an interlocutory order to the effect that they are entitled to have the issue as to the location of the boundary line tried by a jury.—*Martin v. Flippen*, S. C. N. Car., Dec. 19, 1888; 8 S. E. Rep. 345.

14. APPEAL—Record—Presumption. — Where the transcript shows no such irregularities as motion for new trial alleges, the supreme court will presume they did not occur.—*State v. Braniff*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 21.

15. APPEAL—Judgment—Estoppel. — By enforcing a judgment, an appeal from it is waived.—*Reichelt v. Seal*, S. C. Iowa, Dec. 29, 1888; 41 N. W. Rep. 16.

16. ASSIGNMENT OF ERRORS—Statute—Construction. — Construction of Code Iowa, § 3207, providing for assignment of errors.—*Albrosky v. City*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 23.

17. ATTACHMENT—Damages. — In an action for the recovery of property wrongfully seized under attachment against a third person, the measure of damages for the detention of the property is the value of its use during that time.—*Turner v. Younken*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 11.

18. ATTACHMENT—Motion. — Held, error to dismiss motion to dissolve attachment, where there has been alteration of order requiring security for costs.—*Harrison Mach. Works v. Hoising*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 70.

19. ATTACHMENT—Abatement—Execution—Trespass—Verdict. — In an action for damages for the malicious issuance of an attachment, it must be alleged and shown that it was issued maliciously, and without probable cause.—*Beyeradof v. Sump*, S. C. Minn., Dec. 14, 1888; 41 N. W. Rep. 101.

20. ATTACHMENT—Replevin—Pleading—Judgment. — In an action of replevin a general denial puts in issue every material allegation of the petition, and under it the defendant may give evidence of any special matter which amounts to a defense to the plaintiff's cause of action.—*Merrill v. Wedgwood*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 149.

21. ATTORNEY AND CLIENT—Lien. — Respecting the lien of attorney filing bill to redeem mortgage, and paying amounts decreed, as against one having an as-

signment prior to his own.—*Osborne v. Dunham*, N. J. Ct. Chan., Dec. 26, 1888; 16 Atl. Rep. 231.

22. **BANKS AND BANKING**—Principal and Agent.—Where a bank delivers to another bank money, drafts, etc., to pay a creditor, the relation between the debtor bank and the other bank is that of principal and agent, until the creditor assents or acts upon the transaction.—*Brockmeyer v. Washington Nat. Bank*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 855.

23. **BONDS**—Limitation of Actions.—Under Code Iowa, § 2529, the statute begins to run against a tax-sale purchaser's action to recover redemption money paid into the auditor's office, which an ordinance directs the auditor to hold subject to the order of the purchaser, when the auditor in office receives the money from his predecessor, and not when it is first paid into the office.—*Hininger v. Richter*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 55.

24. **BONDS**—Clerk of Court.—The condition of a clerk's official bond, that he will perform the duties of his office during the whole period that he may continue therein, is not broken by his failure to pay over money received by him in a cause pending in his court, unless after an order requiring such payment demand is made during his term of office.—*State v. Lake*, S. C. S. Car., Dec. 7, 1888; 8 S. E. Rep. 322.

25. **BOUNDARIES**—Settlement by Agreement—Statute of Frauds.—Where there is a dispute as to the true division line between adjoining proprietors, and they agree on a permanent boundary, and take possession accordingly, the agreement is binding on them.—*Atchison v. Pease*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 159.

26. **CERTIORARI**—Petition.—Petition in this case held fatally defective under Ga. Code, § 4052, requiring petition for certiorari to set forth plainly and distinctly the errors complained of.—*Western, etc. Ry. v. Jackson*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 209.

27. **CHATTEL MORTGAGES**—On Crops to be Grown—Validity.—The owner of the soil may make a valid mortgage of the crop to be grown by him, before the crop is planted.—*McCann v. Mayer*, S. C. Miss., Nov. 5, 1888; 5 South. Rep. 98.

28. **CHATTEL MORTGAGE**—Animals—Increase.—A mortgage of a mare is a lien on colts afterwards foaled, whether before or after the mortgagee takes possession under the mortgage, as against one having the equitable title to the mare, in favor of a mortgagee who is a bona fide purchaser for value.—*Myer v. Cook*, S. C. Ala., Dec. 10, 1888; 5 South. Rep. 147.

29. **CHATTEL MORTGAGES**—Actual Notice.—Though the description in a chattel mortgage be insufficient to afford constructive notice, it is valid as against attachment creditors having actual notice.—*American Well-works v. Whinery*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 53.

30. **CLERK OF COURT**—Neglect—Liability on Bond.—A county may sue upon the bond of a clerk of court elected by the county, for failure to record pleadings and judgments as required by law.—*Chester County v. Hemphill*, S. C. S. Car., Nov. 27, 1888; 8 S. E. Rep. 195.

31. **CONSTITUTIONAL LAW**—Amendments.—St. Nev. 1887, p. 122, providing for publication of amendments preceding the election is a reasonable requirement and sanctioned by the constitution.—*State v. Davis*, S. C. Nev., Dec. 22, 1888; 19 Pac. Rep. 894.

32. **CONSTITUTIONAL LAW**—Taxation—County Commissioners.—Gen. St. Colo. ch. 97, §§ 67, 70, vests the county commissioner levying tax with merely ministerial duties, and is not in violation of const. Colo. art. 10 § 7.—*People v. County Commissioners*, S. C. Colo., Dec. 14, 1888; 19 Pac. Rep. 892.

33. **CONSTITUTIONAL LAW**—Officers—Compensation.—Resolution by the legislature voting additional pay to parties employed by them is contrary to const. Cal. art. 4, §§ 31, 32.—*Robinson v. Dunn*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 878.

34. **CONSTITUTIONAL LAW**—Legislative Powers—Counties.—Act Md. 1888, ch. 98, extending limits to Balti-

more does not violate const. Md. art. 13, § 1, relating to organization of new counties.—*Daly v. Morgan*, Md. Ct. App., Nov. 23, 1888; 16 Atl. Rep. 287.

35. **CONSTITUTIONAL LAW**—Rules of Evidence.—Act Va. Jan. 26, 1886, prescribing rules of evidence in certain cases is not repugnant to Const. U. S. art. 1, § 10, as latter has no application to procedure in State courts.—*Bryan v. Commonwealth*, Va. Ct. App., Dec. 5, 1888; 8 S. E. Rep. 246.

36. **CONSTITUTIONAL LAW**—Taxation.—Act Va. May 12, 1887, authorizing summary proceedings to collect taxes is not repugnant to const. U. S. art. 1, § 10.—*McGahey v. Commonwealth*, Va. Ct. App., Dec. 5, 1888; 8 S. E. Rep. 244.

37. **CONSTITUTIONAL LAW**—Taxation.—The tax ordinance of the village of Summerville for the year 1887, is void by reason of conflict with the constitution in not laying the tax *ad valorem* upon all property (real and personal) subject to be taxed.—*Verdery v. Village of Summerville*, S. C. Ga., Nov. 28, 1888; 8 S. E. Rep. 213.

38. **CONSTITUTIONAL LAW**—Religious Societies—Incorporation.—Gen. St. Mo. 1865, ch. 70, § 5, as amended by Act Leg. 1871, p. 16, providing for incorporation of religious societies, does not contravene Const. Mo. 1865, art. 1, § 12.—*Keith, etc. Co. v. Bringham*, S. C. Mo., Nov. 26, 1888; 10 S. W. Rep. 32.

39. **CONTEMPT**—Stay of Proceedings—Attorney.—Pending an appeal from an order adjudging an attorney guilty of contempt, and enjoining him from practicing in the district court, where a stay of proceedings has been duly granted, the attorney is entitled to all his former privileges in court.—*Bird v. Gilbert*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 924.

40. **CONTRACTS**—Pleading—Proofs.—Under Code Iowa, § 2730, making it necessary to deny under oath the genuineness of signature to written instrument referred to in the pleading. Notes may be introduced in evidence without proof of signatures.—*Dickey v. Baker*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 24.

41. **CONTRACT**—Sale—Parol Evidence.—A written agreement to pay a sum "at the time of procuring a conveyance of the interest of the patent-title owner" of certain land, in favor of the promise or his grantee, "or at the time of the perfection of the title" in one of them, is due and payable when the title is perfect in the grantee, and parol evidence to show a different meaning is inadmissible.—*Hunt v. Gray*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 14.

42. **CONTRACT**—Sale—Agreement.—Offer made to buy certain stock at any time after Jan. 1, and an acceptance July 9, constitutes no contract.—*Park v. Whitney*, S. J. C. Mass., Jan. 3, 1889; 19 N. E. Rep. 161.

43. **COVENANTS**—Running With the Land.—Covenants entered into by a separate instrument under seal, on a conveyance of a right of way to a railroad company, whereby it undertakes to establish a flag station on the grantor's land to run with the land.—*M. & M. Ry. Co. v. Gilmer*, S. C. Ala., Dec. 10, 1888; 5 South. Rep. 138.

44. **CONVICTS**—Removal to Another Prison.—St. Mass. 1884, ch. 253, § 14, authorizing the removal of "any prisoner" from the State prison at Boston to the reformatory at Concord is not inconsistent with the provision in § 3.—*In re Conlon*, S. J. C. Mass., Jan. 1, 1889; 19 N. E. Rep. 164.

45. **COPYRIGHT**—Pleading.—Sufficiency of averments in bill for infringement of copyright.—*Trow City Dirac. Co. v. Curtin*, U. S. C. C. (N. Y.), Dec. 1, 1888; 36 Fed. Rep. 829.

46. **CORPORATIONS**—Dissolution—Abatement of Action.—A decree dissolving a life insurance company, under authority of Gen. St. Conn. § 2869, abates a suit pending against it, and destroys the lien of an attachment, notwithstanding the provisions of § 1322.—*Wilcox v. Continental Life Ins. Co.*, S. C. E. Conn., Sep. 21, 1888; 16 Atl. Rep. 244.

47. **CORPORATIONS**—Stockholders—Liability for Cor-

porate Debts. — The phrase "liable to the amount of his stock," as used in Const. Ala. 1868, art. 13, §§ 2, 3, and in Code 1867, § 1760, relating to the liability of stockholders for the debts of the corporation, means not simply the amount remaining undue on the stock, but an additional sum equal to the amount of the stock. — *McDonnell v. Alabama Gold Life Ins. Co.*, S. C. Ala., Dec. 5, 1888; 5 South. Rep. 120.

48. CORPORATIONS—Stock—Assignee. — Release of the assignor of stock by the trustee of an insolvent corporation, in payment of a certain amount on account of unpaid installments, does not discharge the assignee, the liability not being joint. — *Glenn v. Foote*, U. S. C. C. (N. Y.), Aug. 3, 1888; 36 Fed. Rep. 824.

49. COUNTIES—Action—Negligence. — Sufficiency of averment in claim against a county under Code § 2610, for injuries received in falling from bridge through negligence of county. — *Dale v. Webster County*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 1.

50. COUNTERCLAIM—Appeal—Costs. — In an action by an administrator against several on a note given to intestate, a debt contracted by intestate to one of the defendants is a proper counterclaim, under Code Iowa, § 2659. — *Sherman v. Hale*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 48.

51. CRIMINAL LAW—Homicide—Indictment. — Sufficiency of indictment charging assault to kill with reference to person charged as being assaulted. — *State v. Knadler*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 923.

52. CRIMINAL LAW—Larceny—Bailor. — One who is intrusted with a horse to sell with the intention that he shall give the money received to the owner is a bailor within the statute Ark. Mansf. Dig. § 1640 making conversion by bailor larceny. — *Datson v. State*, S. C. Ark., Dec. 8, 1888; 10 S. W. Rep. 18.

53. CRIMINAL LAW—Forgery—Indictment. — Sufficiency of indictment under Pen. Code Cal. § 470, making it forgery to fraudulently alter a will. — *People v. Todd*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 883.

54. CRIMINAL LAW—Plea in Abatement—Incompetency of Grand Juror. — The evidence taken in support of a plea in abatement, that one of the grand jurors was incompetent because he had been convicted of felony, did not show affirmatively that the offense for which the juror was convicted was a felony: *Held*, that the plea was properly overruled, even if the statute authorizes a plea in abatement for such cause. — *Woods v. State*, Tex. Ct. App., Nov. 23, 1888; 10 S. W. Rep. 108.

55. CRIMINAL LAW—Homicide—Evidence—Declarations. — On a trial for murder, evidence that while defendant was going directly from the place of the homicide he asked a man going toward the place where the latter was going, and after reply, said, "You had better go, and that damn quick," and then took his gun from his shoulder, is admissible. — *State v. Matthews*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 144.

56. CRIMINAL LAW—Homicide—Self-defense—Threats. — Where there is a conflict of evidence as to whether deceased was approaching defendant with an open knife when the fatal shot was fired, evidence of a threat made by deceased to kill defendant, though not communicated to him, is admissible, as tending to show who was the aggressor. — *Miller v. Commonwealth*, Ky. Ct. App., Dec. 20, 1888; 10 S. W. Rep. 137.

57. CRIMINAL LAW—Homicide—Self-defense. — Where it appears on a trial for murder that deceased had threatened to kill defendant, to whom the threats had been communicated, and that in the quarrel that resulted in the homicide deceased said, "I will kill you," it is admissible to show that deceased habitually went armed, and that defendant knew it. — *King v. State*, S. C. Miss., Dec. 3, 1888; 5 South. Rep. 97.

58. CRIMINAL LAW—Sentence. — Where execution of sentence on conviction of a misdemeanor is stayed, and the convict admitted to bail pending a review in the supreme court, the term of sentence begins when the judgment is affirmed. — *State v. Gruttkau*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 80.

59. CRIMINAL LAW—Evidence. — Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time and place the accused committed or attempted to commit a crime similar to that with which he stands charged. — *Berghoff v. State*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 136.

60. CRIMINAL LAW—Practice—Jury. — Conviction will not be reversed where in trial for felony, on agreement of both sides, the testimony of the principal witness is read to the jury after they had retired to consider their verdict. — *Jamison v. State*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 138.

61. CRIMINAL LAW—Appeal—Evidence—Record. — Though it is improper to allow a witness to state what his testimony was before the grand jury: *Held*, not error when the record shows only that a question calculated to bring out such evidence was allowed and does not show whether it was answered. — *Billingale v. State*, S. C. Ala., Dec. 7, 1888; 5 South. Rep. 137.

62. CRIMINAL LAW—Indictment—Cruelty to Animals. — Sufficiency of averment in indictment under Code N. C. § 2482, declaring against cruelty to animals. — *State v. Watkins*, S. C. N. Car. Dec. 19, 1888; 8 S. E. Rep. 346.

63. CRIMINAL LAW—Evidence—Corroboration. — Prosecutrix, in an indictment for slander, testified on cross-examination as to conversation with one H about her difficulty with defendant. H, on examination by defendant, denied any such conversation: *Held*, that it was not error to permit prosecutrix subsequently to state what the alleged conversation was. — *State v. Shoemaker*, S. C. N. Car., Dec. 18, 1888; 8 S. E. Rep. 332.

64. CRIMINAL LAW—Rape—Indictment. — An indictment for rape is not fatally defective, after judgment, for omitting to repeat the word "feloniously" in charging the consummation of the offense. — *State v. Cuzford*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 32.

65. CRIMINAL LAW—Information—Offense. — The offense charged is to be determined by the statements of fact in the information, and not by the designation given in the caption. — *State v. Wyatt*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 31.

66. CRIMINAL LAW—Homicide—Provocation. — In his statement to the jury, the accused having imputed to his wife the use of the words which may have been the provocation upon which he acted in giving her the mortal blow, the court was warranted in charging upon the sufficiency of words as provocation. — *Fry v. State*, S. C. Ga., Dec. 10, 1888; 8 S. E. Rep. 308.

67. CRIMINAL LAW—Witness. — Under Code Iowa, §§ 4293, 4421: *Held*, that a mistake in the indorsement of the witness' name on the indictment was no ground of objection to him, when called as a witness at the trial, where he testified before the grand jury and signed his true name to the minutes. — *State v. Story*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 12.

68. CRIMINAL LAW—Evidence—Confessions—Fear and Compulsion. — On examination to determine whether confessions were made with that degree of freedom to warrant their admission, it is error to exclude evidence offered by the prisoner to show that they were procured through fear and compulsion. — *State v. Kinder*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 78.

69. CRIMINAL LAW—Evidence of Venue. — Facts held sufficient to warrant the inference that the larceny was committed where the venue was laid. — *State v. Hill*, S. C. Mo., Nov. 26, 1888; 10 S. W. Rep. 28.

70. CRIMINAL LAW—Record—Failure to Swear Jury. — In a misdemeanor case, it is no ground for reversal that the record fails to show that the jury, was specially sworn, since it presumed that the general oath of the term was administered to them. — *Ruble v. State*, S. C. Ark., Dec. 15, 1888; 10 S. W. Rep. 23.

71. CRIMINAL LAW—Appeal—Record—Failure to Plead. — Under Mansf. Dig. Ark. § 2468, it is no ground for reversal that the record fails to show that a plea was entered by defendant, defendant having submitted to a trial as under a plea of not guilty. — *Noore v. State*, S. C. Ark., Dec. 15, 1888; 10 S. W. Rep. 22.

72. CRIMINAL LAW—Evidence—Accomplice.—Question whether under certain facts the wife was a statutory accomplice of her husband within meaning of Mansf. Dig. Ark. §§ 1507, 1510. — *Edmonson v. State*, S. C. Ark., Dec. 8, 1888; 10 S. W. Rep. 21.

73. CRIMINAL LAW—Larceny—Indictment.—An indictment for larceny, describing the property alleged to be stolen as "two ten-dollar bills of United States currency," is fatally vague and uncertain. — *State v. Oakley*, S. C. Ark., Dec. 1, 1888; 10 S. W. Rep. 17.

74. DAMAGES—Liquidated.—Under Civil Code Cal. §§ 1670, 1671, an agreement to pay \$200 per month and an attorney's fee, for failure to deliver possession of land on a certain day, is void. — *Eva v. McMahon*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 572.

75. DEED—Description.—Sufficiency of description of land in deed. — *Tierney v. Brown*, S. C. Miss., Nov. 12, 1888; 5 South. Rep. 104.

76. DEMURRAGE—Coal Orders.—Libelants offered a schooner to defendants' agent to load, whereupon the agent filled up a "coal order" to one of defendants' coal pockets, which libelants accepted: Held, that the order was incorporated in the contract, and defendants were relieved from liability for failure to furnish a load by a clause to that effect in the order. — *Morse v. Lehigh*, etc. Co., U. S. C. C. (N. Y.), Oct. 15, 1888; 36 Fed. Rep. 831.

77. DISMISSAL—Appeal—Defendants.—Appeal from temporary injunction after argument on appeal plaintiff dismissed the suit below: Held, that as the dismissal operated to dissolve injunction the supreme court had no real controversy before it. — *Chicago, etc. Co. v. Dey*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 17.

78. DISORDERLY HOUSE—Evidence—Opinion.—On a prosecution for keeping a disorderly house, an answer of a witness will not be stricken out, though it contains an irrelevant expression of opinion upon the propriety of granting a license so near a school. — *Delaney v. State*, S. C. N. J., Dec. 23, 1888; 16 Atl. Rep. 267.

79. DIVORCE—Adultery—Evidence.—Facts held not sufficient proof of adultery in suit for divorce. — *Peavey v. Peavey*, S. C. Iowa, Dec., 22, 1888; 41 N. W. Rep. 67.

80. DOWER—Assignment—Allotment of Homestead—Joinder.—Under Rev. St. Mo. § 2694, an action for the recovery of dower and homestead may be joined in one count, but the widow cannot seek in one count the recovery of homestead, and in a second count the recovery of dower. — *Bryan v. Rhoades*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 53.

81. DOWER—Renunciation—Insanity.—A widow who is insane cannot renounce the provisions of her husband's will and elect to take dower. — *Young v. Bondman*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 48.

82. DRAINAGE—Notice of Petition—Collateral Attack.—Under the Indiana drainage act 1879, (1 Rev. St. 1876, p. 428), § 2: Held, upon the facts that there was some notice, and that the assessment and collection of the tax for the drain cannot be enjoined in a collateral proceeding. — *Montgomery v. Wasem*, S. C. Ind., Dec. 20, 1888; 19 N. E. Rep. 184.

83. EJECTMENT—Improvements—Knowledge of Defendant.—Defendant, in ejectment, cannot assert a claim for improvements made in good faith, on the ground that he supposed the *locus in quo* was a vacancy between his survey and plaintiff's, when his own deed, under which plaintiff claims, calls for joining the two surveys, and the evidence shows that the surveyor intended to leave no vacancy. — *Brown v. Bedinger*, S. C. Tex., Dec. 11, 1888; 10 S. W. Rep. 50.

84. EJECTMENT—Evidence—Intervenor's Petition.—In ejectment, it is not error to exclude from evidence an intervening petition, and the proceedings on issues thereon, to which plaintiff is not a party, and the issues in which are still pending. — *Atkinson v. Dixon*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 163.

85. EJECTMENT—Surviving Partner—Lands of Firm.—Land conveyed to a firm, but never used in the partnership business, cannot, as a whole, be recovered in ejectment by the surviving partner. — *Baber v. Middlebrooks*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 329.

86. EJECTMENT—Defenses—Foreclosure—Fraud—Rescission.—After land has been sold under a deed of trust to secure the purchase money and purchased by the vendor, the vendee having retained possession of the land, cannot defend ejectment by the vendor on the ground of fraudulent misrepresentations by the vendor inducing the first sale. — *Crumb v. Wright*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 74.

87. EMINENT DOMAIN—Damages.—Evidence that the land across which a right of way is located contains beds of coal, is admissible to show the market value of the land as an entirety, and for purposes for which it might be available in the future, though the ownership of the coal is not appropriated, the jury being instructed to that effect. — *Doud v. Mason City*, etc. Co., S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 65.

88. EMINENT DOMAIN—Foreign Corporation.—While the constitution of this State provides that no railroad corporation organized under the laws of another State shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws of this State, it does not prohibit existing railroad companies, one of which is a domestic corporation, from becoming a body corporate by consolidation. — *State v. Chicago B. & Q. R. Co.*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 125.

89. EQUITY—Jurisdiction—Fraud.—Where defendant sold complainant's property under a deed of trust, and sued for the balance due on the note, equity has jurisdiction of a bill charging fraud and praying that the prosecution of defendant's suit be restrained. — *Adams v. Ball*, S. C. Miss., Nov. 12, 1888; 5 South. Rep. 109.

90. EQUITY—Action to Set Aside Deed—Fraud of Parties.—Where land taken in the name of a third person for the purpose of defrauding creditor's with knowledge of grantee, the deed is binding between the parties. — *Brett v. Brett*, S. C. Miss., Nov. 5, 1888; 5 South. Rep. 105.

91. EQUITY—Trustee—Parties.—Circumstances under which conveyance wrongfully made by trustee cannot be cancelled by court of equity unless trustee is a party. — *Humphries v. Humphries*, W. Va. Ct. App., Nov. 24, 1888; 8 S. E. Rep. 283.

92. EQUITY—Marshalling Assets.—On bill to marshal assets of decedent's estate where the whole fund was in court for distribution: Held, error after ordering senior judgments paid to refuse to direct payment of petitioner's mortgage out of the residue. — *Ackerman v. Moor*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 321.

93. EQUITABLE ASSIGNMENT.—Fact under which the court held an equitable assignment of purchaser's right on sale under foreclosure of mortgage. — *Gilbert v. Human*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 3.

94. EQUITY—Rescission of Contract—Cancellation of Note—Mistake.—Equity will cancel a promissory note executed under the belief that the maker owed the payee, where in fact it was another person of the same name that owed the account. — *Fitzmaurice v. Mosier*, S. C. Ind., Dec. 20, 1889; 19 N. E. Rep. 180.

95. ESTATES—Condition Subsequent—Demand.—Under a condition subsequent, avoiding a deed if the grantee should fail to make three consecutive annual payments, it is not essential to a defeasance of the estate that any demand or notice of the non-payment of the amount should be made. — *Royal v. Aultman Taylor Co.*, S. C. Ind., Dec. 22, 1888; 19 N. E. Rep. 202.

97. EVIDENCE—Best and Secondary—Lost Paper's—Continuance.—Where, as in respect to a written notice to sue, there is but a feeble presumption that a paper has been preserved, the defendant may introduce parol evidence of its contents after proving that the plaintiff, on inquiry for it pending the suit, answered that it was lost, that she had made diligent search for it, that she believed it destroyed, but that she was bound by it. — *Crawford v. Hodge*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 208.

## 97. EVIDENCE—Documentary—Parol to Vary Records.

—A deed executed by a sheriff at an execution sale, under a judgment in which he and his wife are usees, is void, and parol evidence is not admissible, on the trial of a claim made by the grantee upon the levy of a subsequent execution, to show that, at the time of the sale, the sheriff was divorced from his wife, and that she was the only usee.—*Morrison v. Knight*, S. C. Ga., Dec. 28, 1888; 8 S. E. Rep. 211.

98. EVIDENCE—Witness—Criminating Questions.—Construction of Code Iowa, § 3647, providing that witness shall not be compelled to answer questions that criminate him.—*Makanke v. Cleland*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 63.

99. EVIDENCE—Documents—Presumption.—Every reasonable presumption will be against party withholding documents in his possession, after due notice to produce.—*McGuinness v. School Dist.*, S. C. Minn., Dec. 14, 1888; 41 N. W. Rep. 103.

100. EVIDENCE—Witness—Examination of Expert.—In the examination of an expert witness, it is no objection to questions of counsel that he reads them from a medical book, or repeats them to the witness from memory.—*Tompkins v. West*, S. C. Conn., July 7, 1888; 16 Atl. Rep. 237.

101. EXECUTION—Levy—Priorities.—Goods in the possession of an officer under levy may be levied upon constructively by another officer having other process, and the process under which such constructive levy is made is entitled to satisfaction in preference to process subsequently coming into the possession of the officer making the first levy.—*Penland v. Leatherwood*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 234.

102. EXECUTORS AND ADMINISTRATORS—Advancement—Overpayment.—Question whether, under any circumstances, an executor has a right to recover back from a legatee an excess of advancements made to the latter.—*Hurst v. Morgan*, W. Va. Ct. App., Nov. 24, 1888; 8 S. E. Rep. 255.

103. EXECUTORS AND ADMINISTRATORS—Appointment—Petition.—Under Rev. Stat. Me. ch. 64, § 1, it is sufficient if the petition alleges that deceased "died intestate, possessed of goods remaining to be administered, leaving no widow."—*Danby v. Dances*, S. J. C. Me., Dec. 8, 1888; 16 Atl. Rep. 255.

104. EXECUTORS AND ADMINISTRATORS—Sales—Devise.—A purchaser of land, specifically devised, at a sale by an executor under order of court, which has been held void, and the land recovered by the devisee's grantee, has no lien for the purchase price.—*Frost v. Atwood*, S. C. Mich., Nov. 23, 1888; 41 N. W. Rep. 96.

105. EXECUTION—Against the Person—Affidavit.—Before an execution against the person of a judgment debtor can be allowed, under the provisions of § 507, Civil Code, an affidavit therefor must be made by the judgment creditor or his attorney.—*In re Heath*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 926.

106. EXECUTION—Sale—Waiver of Mortgagor's Rights.—The mortgagee in possession cannot, by consenting to the sale of the equity of redemption in the property, waive the mortgagor's right to object to its validity.—*Metzler v. James*, S. C. Colo., Dec. 10, 1888; 19 Pac. Rep. 885.

107. EXEMPTIONS—Statute—Construction.—Under acts Conn. 1887, ch. 132, § 1, and amendments the day after its passage and revision of Jan. 1, 1888: Held, the intent of the legislature protect wages earned after June 1, 1887, without reference to when debt was contracted.—*Burns v. Plume, etc. Co.*, S. C. Conn., Dec. 18, 1888; 16 Atl. Rep. 280.

108. FOREIGN INSURANCE COMPANIES—Quo Warranto.—*Quo warranto* held to be a proper proceeding to try the right of a foreign corporation to carry on its corporate business in this State.—*State v. Fidelity Ins. Co.*, S. C. Minn., Dec. 27, 1888; 41 N. W. Rep. 108.

109. FOREIGN JUDGMENT—Limitation of Actions.—A judgment of a superior court of a State of the union other than this State, sued on in this State: Held, a for-

eign judgment, within the intent and meaning of § 10 of the Code of Civil Procedure.—*Marx v. Kilpatrick*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 111.

110. FOREIGN JUDGMENTS—Evidence.—Held, that transcript of foreign judgment is *prima facie* evidence that the judgment had been recovered.—*Rea v. Scully*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 87.

111. FRAUDS—Statute of—Agreement not in Writing—Assumption of Fire Risk.—A verbal promise to a landlord by a creditor who, as security for a debt, takes possession of a tenant's crop, that he will assume the risk of fire upon being allowed to store it in a place considered dangerous by the landlord, is not within the statute of frauds.—*Dillon v. Patterson*, S. C. Miss., Nov. 26, 1888; 5 South. Rep. 103.

112. FRAUDS—Statute of—Payment—Possession.—An oral contract for the purchase of real estate, followed by the payment of a portion of the purchase price and the taking of actual possession, would constitute a valid contract.—*Lipp v. Hunt*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 143.

113. FRAUDULENT CONVEYANCES—Sales to Accommodation Indorsers.—Accommodation indorsers may, on assuming the payment of the note, take in satisfaction of their liability, at its fair value, property of the principal debtor, who is insolvent.—*State v. Mason*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 179.

114. FRAUDULENT CONVEYANCE—Parent and Child.—Facts sufficient to establish fraudulent conveyance of land from mother to son.—*Peterson v. Rone*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 68.

115. FRAUDULENT CONVEYANCES—Husband and Wife—Estoppel.—A conveyance by a husband to his wife in repayment of a loan by her from property held in her own right, is not fraudulent as to creditors who commenced attachment proceedings about the time of the execution of the conveyance.—*Citizens' Nat. Bank v. Webster*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 47.

116. FRAUDULENT CONVEYANCES—Husband and Wife—Estoppel.—Though the husband acquires the legal title to the wife's money loaned by her to him, she has an equitable claim therefor which, together with a release of her contingent interest and homestead right in land of the husband, by joining in a mortgage with him, is a sufficient consideration for the husband's note to her as against debts subsequently contracted by him.—*Payne v. Wilson*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 45.

117. GAMING—Contracts—False Representations.—One who has purchased grain of a broker on margins, and has made regular settlements with him, cannot recover back money so lost on the ground that the broker falsely represented that he was dealing through a particular commission house.—*O'Brien v. Luques*, S. J. C. Me., Dec. 10, 1888; 16 Atl. Rep. 304.

118. GRAND JURY—Qualification—Opinions.—Opinions disqualifying grand jurors must arise from something heard outside the grand jury room.—*People v. Northey*, S. C. Cal., Dec. 27, 1888; 19 Pac. Rep. 863.

119. GUARDIAN AND WARD—Suit on Bond—Judgment.—The judgment, in an action on a guardian's bond for misconduct, should be for the penal sum of the bond, and to be discharged on the payment of the damages sustained.—*Anthony v. Estes*, S. C. N. Car., Dec. 19, 1888; 8 S. E. Rep. 347.

120. HIGHWAYS—Defects—Notice.—Notice to municipal officers that a culvert was not of sufficient size to readily vent the water, is not notice of a defect.—*Pendleton v. Northport*, S. J. C. Me., Nov. 30, 1888; 16 Atl. Rep. 233.

121. HIGHWAYS—Establishment—Report of Viewers—Collateral Attack.—In a collateral proceeding to restrain the collection of assessments for a gravel road, the report of viewers appointed to locate the road is sufficient to show that they met on the day appointed.—*Hobbs v. Board of Commissioners*, S. C. Ind., Dec. 20, 1888; 19 N. E. Rep. 186.

122. HIGHWAYS—Taxes—Assessments.—Taxes for highway purposes, under the tax law of Michigan of

1882, can only be assessed by the supervisors upon the certificate of the township clerk that the proposed tax has been voted.—*Sage v. Stevens*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 919.

123. HIGHWAYS—Work on Road—Notice.—Construction of Mans. Dig. Ark. § 5907, providing for prosecution of those failing to work on road and question of notice to those delinquent.—*Ford v. State*, S. C. Ark., Dec. 1, 1888; 10 S. W. Rep. 14.

124. HOMESTEAD—Conveyance—Estoppel.—The title to a homestead cannot be divested or incumbered by deed, unless such deed be executed and acknowledged by both husband and wife.—*Betts v. Sims*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 117.

125. HUSBAND AND WIFE—Wife's Separate Estate.—Plaintiff, her husband joining, executed a trust deed of her property to secure payment of supplies to be advanced. On default, the land was sold under the deed, and bought in by the creditors: *Held*, that deed was valid.—*Walker v. Ross*, S. O. Miss., Nov. 5, 1888; 5 South. Rep. 107.

126. HUSBAND AND WIFE—Wife's Separate Estate—Liability of Wife.—Code Miss. 1880, § 1177, does not prevent the wife from making the agency of the husband, by her conduct, broader than that provided for by the statute.—*Ross v. Baldwin*, S. C. Miss., Nov. 19, 1888; 5 South. Rep. 111.

127. HUSBAND AND WIFE—Wife's Separate Estate—Creditor's Bill.—Under Rev. Stat. Me., ch. 61, § 1, judgment creditor of husband can, upon facts of this case, maintain bill against equitable interest of wife.—*Merrill v. Jose*, S. J. C. Me., Dec. 8, 1888; 16 Atl. Rep. 254.

128. HUSBAND AND WIFE—Suit by Wife—Joinder of Husband.—Under acts Va. 1876-77, p. 338, a husband is required to be joined with the wife in a suit instituted by her for the protection of her separate property against creditors of the husband.—*Burnson v. Andes*, S. C. App. Va., June 16, 1888; 8 S. E. Rep. 249.

129. HUSBAND AND WIFE—Mortgage—Wife's Separate Estate—Suretyship.—Under Rev. Stat. Ind. 1881, § 5119, providing that a contract of suretyship by a married woman shall be void as to her, her children, on her death while married, stand in her shoes, and may set up the invalidity of a mortgage of her separate estate, executed by her as surety, in a proceeding against them as her heirs to foreclose.—*Ellis v. Baker*, S. C. Ind., Dec. 21, 1888; 19 N. E. Rep. 193.

130. HUSBAND AND WIFE—Contracts—Partnership.—The Michigan married woman's act (How. Stat. §§ 6295-6299) does not authorize a husband and wife to enter into a contract of partnership between themselves so as to render themselves jointly liable for the contracts of the firm thus established.—*Artman v. Ferguson*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 907.

131. HUSBAND AND WIFE—Contracts by Wife—Separate Estate.—A plea to an action on an insurance policy, averring that when plaintiff purchased the goods insured, she was and still remained a married woman, that she purchased them on credit, had not paid and refused to pay for them, and that hence she had no insurable interest therein, is insufficient.—*Queen Ins. Co. v. Young*, S. C. Ala., Dec. 5, 1888; 5 South. Rep. 116.

132. HUSBAND AND WIFE—Wife's Separate Estate—Debts of Husband.—In an action of replevin, instituted by a married woman for the possession of her personal property levied upon by the sheriff under execution against her husband: *Held*, that the property so purchased would not be subject to seizure upon final process against the husband, even though in the management and use of the property the husband was permitted to have charge of it, and even though the property was listed for taxation in his name.—*Taggart v. Fowler*, S. C. Neb., Dec. 13, 1888; 40 N. W. Rep. 254.

133. INDIANS—Sale of Land.—Deed of white adopted member of Indian tribe to a white man, of land which, under treaty with the United States, could not be aliened, is absolutely void.—*Sheldon v. Donohoe*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 901.

134. INFANCY—Fraudulent Representations—Pleading.—In an action on a note, in which infancy is pleaded, error in allowing the declaration to be amended by averring that defendant fraudulently represented that he was twenty-one years of age is cured by a charge that such representations will not authorize a recovery on the contract if defendant was an infant.—*McKamy v. Cooper*, S. C. Ga., Dec. 10, 1888; 8 S. E. Rep. 312.

135. INJUNCTION—Pleading.—Demurrer to bill for want of equity was properly sustained.—*Scruggs v. Burke*, S. C. Ga., Nov. 21, 1888; 8 S. E. Rep. 209.

136. INJUNCTION—Trust Deed—Sale.—Facts not held sufficient to support finding for plaintiff in suit to enjoin sale of land under trust deed.—*Van Meter v. Hamilton*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 71.

137. INJUNCTION—Assessment of Damages.—After an injunction *pendente lite* has been dissolved at the final hearing, a motion for an assessment of damages caused by the injunction, made at a subsequent term, without notice to the adverse party, should be denied.—*Hoffmann v. Franke*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 45.

138. INSOLVENCY—Discharge—Practice.—A creditor who desires to oppose an insolvent's discharge must appear for that purpose on the day assigned for a hearing, and his appearance to oppose a discharge is not implied from his appearance on such occasion for other purposes.—*In re Butterfield*, S. J. C. Me., Nov. 18, 1888; 16 Atl. Rep. 247.

139. INSOLVENCY—Allowance of Claims—Partnership.—A creditor of an insolvent firm has such an interest in the individual estate of one of the partners, who is solvent, as will give him the right of appeal from the allowance of a claim against such estate by an individual creditor.—*Chadbourne v. Harding*, S. J. C. Me., Nov. 19, 1888; 16 Atl. Rep. 248.

140. INSURANCE—Acting as Agent—Information.—Under act Texas, July 9, 1879, prohibiting any person from acting as agent of an insurance company which has not complied with the laws of that State, an information is insufficient in not alleging that the company named was an insurance company.—*Brown v. State*, Tex. Ct. App., Dec. 12, 1888; 10 S. W. Rep. 112.

141. INSURANCE—Sunday—Action.—Where an insurance policy requires suit to be brought within twelve months after a fire occurs, and the last day of such twelve months falls on Sunday, suit brought on the following Monday is in time.—*Owen v. Howard Ins. Co.*, Ky. Ct. App., Dec. 4, 1888; 10 S. W. Rep. 119.

142. INSURANCE—Pleading and Proof.—In an action upon a fire insurance policy, the declaration being in ordinary form, it is reversible error to admit evidence that by fraud or mistake of the defendant's agent a clause was inserted in the policy different from that agreed upon by plaintiffs.—*O'Donnell v. Connecticut Fire Ins. Co.*, S. C. Mich., Nov. 28, 1888; 41 N. W. Rep. 95.

143. INSURANCE—Premiums—Waiver—Custom.—Where an insurance company, by its habits of business, creates in the mind of a policy holder the belief that payment of premiums may be delayed until demanded, is binding on the company.—*Home Protection v. Avery*, S. C. Ala., Dec. 7, 1888; 5 South. Rep. 143.

144. INSURANCE—Husband and Wife—Parties.—The wife cannot maintain an action at law on an insurance policy on her property, taken out in the name of the husband; neither the policy nor the application showing agency or trusteeship on his part.—*Zimmerman v. Farmers' Ins. Co.*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 39.

145. INSURANCE—Agent—Statute.—Facts sufficient to show that party occupies as to the company whose policy is issued the position of agent, under acts Gen. Assemb. Iowa, ch. 211, § 1.—*St. Paul, etc. Co. v. Shaver*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 19.

146. INSURANCE—Benevolent Society.—*Held*, that benevolent society, under the features of this case, was in effect an insurance company, and as such amenable to the statutes regulating insurance.—*State v. Nichols*, S. C. Iowa, Dec. 20, 1888; 41 S. W. Rep. 4.

147. **INSURANCE—Accident—Policy—Change after Injury.**—Accident insurance company has power after the injury to correct mistake in policy as to occupation of the insured.—*Ford v. U. S., etc. Co., S. J. C. Mass., Jan. 1, 1889; 19 N. E. Rep. 169.*

148. **INSURANCE—Accident Insurance—Injury.**—A policy of accident insurance contained the express condition that it should not cover accidents from trying to enter a moving steam vehicle; the assured was killed while attempting to get on a moving railway train: Held, that the company was not liable.—*Miller v. Travelers' Ins. Co., S. C. Minn., Dec. 27, 1888; 40 N. W. Rep. 839.*

149. **INSURANCE COMPANIES—Taxation—Exemption.**—Chapter 66, Laws 1887, amending chapter 77, Laws 1885, were not intended to exempt insurance companies from license tax within limits of cities of the second-class and villages.—*City of Columbus v. Hartford Ins. Co., S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 140.*

150. **INTEREST—Coupons.**—§ 1, ch. 44, Comp. Stat. 1887, forbids the allowance of interest in excess of ten per cent. upon any loan, and where the interest provided for is represented by coupons providing that interest shall be allowed thereon after maturity, at the maximum rate, no interest will be allowed on such coupons.—*Matthews v. Toogood, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 130.*

152. **INTOXICATING LIQUORS—Information.**—Sufficiency of averments in information under Laws Miss. 1885, ch. 296, § 1.—*Sires v. State, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 81.*

153. **INTOXICATING LIQUORS—Local Option—Indictment—Proof of Law.**—Under Code Ga. § 3315, it is not necessary on an indictment for violation of local option law to allege or prove that the law had gone into effect in a county which had adopted it by a vote of the people.—*Combs v. State, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 313.*

154. **INTOXICATING LIQUORS—License—Mandamus.**—Petition for mandamus to compel village trustees to approve liquor bond, not granted where trustees reject sureties as insufficient as Acts Mich. 1887, No. 313, § 8, leaves it to the "judgment" of the trustees.—*Palmer v. President, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 850.*

155. **INTOXICATING LIQUORS—Illegal Sale—Prohibited District.**—Construction of Act Mansf. Dig. Ark. § 4524, prohibiting sale of liquor within three miles from a church, under the facts of this case.—*Herron v. State, S. C. Ark., Dec. 15, 1888; 10 S. W. Rep. 25.*

156. **INTOXICATING LIQUORS.**—Under the Iowa statute prohibiting the manufacture and sale of intoxicating liquors, a beverage containing alcohol is an intoxicant, regardless of whether the quantity of alcohol contained in it is of itself intoxicating.—*State v. Intoxicating Liquors, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 6.*

157. **INTOXICATING LIQUORS—Illegal Sales—Sales by Druggist.**—Held, under Act Ark. March 21, 1881, §§ 1, 3, that the legislature intended to intrust no one in the prohibited districts with the right to furnish liquors but the physician who has complied with the law.—*Battle v. State, S. C. Ark., Dec. 1, 1888; 10 S. W. Rep. 12.*

158. **JUDGMENT—Pleading.**—A complaint will be liberally construed, upon a motion by defendant at the time of the trial of the action, and after answering, for judgment on the pleadings.—*McAllister v. Welker, S. C. Minn., Dec. 27, 1888; 41 N. W. Rep. 107.*

159. **JUDGMENT—Equitable Relief—Justice of the Peace.**—Where an action was commenced before a justice of the peace, who, at the time of the commencement of the suit, designated a time for trial, but when, upon issuing the summons, he designated an earlier time, but of which the plaintiff had no notice, until after a judgment had been rendered against her, such judgment, if valid, must be corrected by a direct proceeding.—*Proctor v. Pettit, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 131.*

160. **JUDGMENT—Res Adjudicata.**—In ejectment, plaintiffs claimed title by devise. Defendant admitted title in the testator, but denied that the devise covered

the land in dispute. Judgment was rendered for plaintiff on a general verdict: Held, that defendant was estopped by the record to deny plaintiff's title at the date of that judgment.—*Bickett v. Nash, S. C. N. Car., Dec. 21, 1888; 8 S. E. Rep. 340.*

161. **JUDICIAL SALES—Bond by Purchaser.**—The court may order a purchaser at commissioner's sale under a decree in equity to execute a bond for the price, the purchaser having been summoned to show cause why such rule should not issue, and having failed to present any excuse or defense.—*Brassfield v. Burgess, Ky. Ct. App., Dec. 15, 1888; 10 S. W. Rep. 122.*

162. **JUDICIAL SALES—Reversal of Decree—Recovery of Money.**—Where money from the sale of property has, by order of the court, been paid, and the decree ordering its payment, was void, the party whose property was sold to raise the money may recover the same from the party to whom it was illegally paid.—*Sturm v. Fleming, W. Va. Ct. App., Dec. 14, 1888; 8 S. E. Rep. 263.*

163. **JURY—Summoning—Prejudice of Sheriff and Coroner.**—On motion for the appointment of jurors in a criminal case, the defendant's affidavit, alleging prejudice in the sheriff and coroner, is not conclusive, and the denial of the motion is not ground for reversal, in the absence of abuse of discretion.—*State v. Matthews, S. C. Mo., Nov. 26, 1888; 10 S. W. Rep. 30.*

164. **JUSTICE OF PEACE—Replevin.**—Section 931 of the Code which requires the filing of a bill of particulars on the part of the plaintiff in all cases before a justice of the peace: Held, not applicable to an action of replevin.—*Hill v. Wilkinson, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 135.*

165. **LANDLORD AND TENANT—Lease—Forfeiture.**—Where, by the terms of a lease, the lessee is permitted to erect houses on the leased lot, with privilege of removal, the mere fact that the houses are suffered to remain after the expiration of the lease, and pending litigation between the parties as to right of possession of the lot, does not work a forfeiture of the houses.—*Atkinson v. Dixon, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 162.*

166. **LIENS ON CROPS—Sale.**—Where, upon a bona fide sale of seed-wheat, the amount of wheat specified in the seed-grain note or contract given therefor was contained in a particular bin containing a larger quantity, all of the same quality and value, out of which it was agreed the purchaser was then and there entitled to take away the number of bushels purchased: Held, sufficient evidence of a sale and delivery of the wheat at the date of the note, as between the maker and payee.—*Nash v. Brewster, S. C. Minn., Dec. 21, 1888; 41 N. W. Rep. 105.*

167. **LIFE INSURANCE—Condition in Policy.**—Held, that condition in policy of life insurance against insured being in liquor business, applied only to connection with liquor business after date and delivery of policy.—*McGurk v. Met. Life Ins. Co., S. C. Conn., Dec. 18, 1888; 16 Atl. Rep. 263.*

168. **LIMITATION OF ACTION—Breach of Warranty.**—Grantee's right of action for amount paid to redeem land under warranty and statute begins to run from time of payment.—*Hebron v. Yerger, S. C. Miss., Nov. 12, 1888; 5 South. Rep. 110.*

169. **LIMITATION OF ACTIONS—Adverse Possession—Color of Title—Forged Deed.**—Where defendant purchased land in good faith, taking a bond for title from one signing it as the owner's agent, who had no authority in fact, it is color of title, and seven years' possession thereunder, in good faith, confers a good prescriptive title.—*Millen v. Stines, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 315.*

170. **LIMITATION OF ACTIONS—Adverse Possession.**—Though a deed, for want of words of inheritance, conveys but a life-estate, yet, as against a stranger, title in the grantee will be presumed from his occupancy for more than 20 years.—*McAlpine v. Daniel, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 215.*

171. **LIMITATION OF ACTIONS—Disability.**—Question

when right of action accrued in this case and therefore whether recovery, barred by Gen. St. Ky. ch. 71, art. 1, § 4, limiting even to persons under disability the right to sue within statutory period.—*Bradley v. Burgess*, Ky. Ct. App., Dec. 8, 1888; 10 S. W. Rep. 5.

172. LOGS AND LOGGING—Lien.—Interpretation of Laws Wis. 1867, ch. 100, 1881, ch. 33, 1885, ch. 469, § 1, providing lien for loggers.—*Patten v. N. W. Lumber Co.*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 82.

173. MANDAMUS—Judgment.—Application for mandamus against board of directors to prepare for payment of judgment against the distruts was dismissed without prejudice, the judgment being found dormant, in order that proceedings might be taken to revive judgment.—*State v. School District S. C. Neb.*, Dec. 14, 1888; 41 N. W. Rep. 155.

174. MASTER AND SERVANT—Contract of Hiring—Acceptance—Compromise.—An agreement by one to accept employment is not necessary to the validity of a promise by another to employ him, made as a part of the compromise of an action.—*East Line & R. R. Co. v. Scott*, S. C. Tex., Nov. 20, 1888; 10 S. W. Rep. 99.

175. MASTER AND SERVANT—Negligence.—Question of contributory negligence on part of servant where the defect which caused the injury was apparent.—*Yates v. McCulloch*, Iron Co. Md. Ct. App., Nov. 22, 1888; 16 Atl. Rep. 280.

176. MASTER AND SERVANT—Negligence—Defective Appliance.—Testimony reviewed with reference to negligence of defendant in providing defective hand car, upon which plaintiff was injured.—*Anderson v. M. & N. W. Co.*, S. C. Minn., Dec. 21, 1888; 41 N. W. Rep. 104.

177. MASTER AND SERVANT—Negligence.—Railroad company not liable for injury to servant caused by his negligence.—*Way v. C. & N. W. R. Co.*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 51.

178. MASTER AND SERVANT—Negligence.—Servant held guilty of negligence in uncoupling cars against rule of the company while in motion.—*Sedgwick v. Ill. Cent. R. Co.*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 35.

179. MASTER AND SERVANT—Negligence—Injury.—Question as to negligence of conductor of railroad train in prematurely ordering train to start and injuring fellow-servant.—*Central R. R. v. Smith*, S. C. Ga., Dec. 5, 1888; 8 S. E. Rep. 311.

180. MASTER AND SERVANT—Negligence.—Question of negligence on part of railroad company for death of engineer through defects in the track, of which it had notice.—*Worden v. Humerton & S. R. Co.*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 26.

181. MASTER AND SERVANT—Negligence.—Question of negligence on part of plaintiff in crossing track at night and on part of defendant in the breaking of coupling link between cars.—*Griffin v. B. & A. R. Co.*, S. J. C. Mass., Jan. 1, 1889; 19 N. E. Rep. 166.

182. MASTER AND SERVANT—Discharge—Evidence—Damages.—Testimony admissible on part of defendant in action to recover damages for wrongful discharge from service.—*Child v. Detroit, etc. Co.*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 916.

183. MECHANIC'S LIENS—Material Men—Husband and Wife—Wife's Separate Estate.—Under act Wis. 1885, amending Rev. St. Wis. § 3314, one furnishing materials to a husband, who is erecting a house on the lands of his wife, with her knowledge and consent, has a lien on the land, though she did not agree or consent to pay for the material.—*Heath v. Solles*, S. C. Wis., Dec. 22, 1888; 40 N. W. Rep. 804.

184. MINES AND MINING—Lease.—Under agreement with owner of mines defendant was limited to work the range to a certain point: Held, under the evidence that there was not a new discovery of ore so as to relieve defendant from the original limitation.—*Raisbeck v. Anthony*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 72.

185. MORTGAGE—Deed—Parol Evidence.—Held, under the facts that the deed was a mortgage and its character could not be varied by parol evidence.—*Hart v. Eppstein*, S. C. Tex., Nov. 13, 1888; 10 S. W. Rep. 85.

186. MORTGAGE—Deed Absolute.—A bill to declare deed absolute in form a mortgage, held upon the facts that complainant's right of redemption was extinguished by a settlement, the deed thereby becoming absolute.—*McWilliam v. Jewett*, S. C. Ala., Dec. 8, 1888; 5 South. Rep. 145.

187. MORTGAGE—Payment—Evidence.—Evidence sufficient as between a subsequent mortgagee and defendant's wife, who has since bought the equity of redemption to show payment of the mortgage.—*Shipley v. Fox*, Md. Ct. App., Dec. 14, 1888; 16 Atl. Rep. 275.

188. MORTGAGES—Sale—Power.—Circumstances which justify court in setting aside sale of property under power in mortgage.—*Chilton v. Brooks*, Md. Ct. App., Dec. 14, 1888; 16 Atl. Rep. 267.

189. MORTGAGE—Construction.—Under Code, §§ 3329, 3330, a transaction in which a mortgagee takes a conveyance of the legal title and executes bond to reconvey on payment of debt is a mortgage.—*McElhane v. Shoemaker*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 58.

190. MORTGAGES—Foreclosure—Election of Remedies.—A mortgagee who has taken an assignment of the bid of the purchaser at a sale under a power in the mortgage, and who sues the mortgagor to recover his debt, possession of the land, and for the sale of the land under a decree of foreclosure, by his complaint places at the option of the mortgagor the confirmation or rejection of the sale under the power.—*Martin v. McNeely*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 231.

191. MORTGAGES—Foreclosure—Pleading.—Unless it appears, in a complaint for foreclosure, that a defendant, claiming an interest in the mortgaged premises, occupies the relation of subsequent purchaser, an averment that the mortgage was duly recorded is not essential.—*Mann v. State*, S. C. Ind., Dec. 20, 1888; 19 N. E. Rep. 181.

192. MORTGAGES—Foreclosure.—The purchaser at a sale under a second deed of trust, who took possession, was not liable to a trustee for the rents accruing while he was in possession, and before the trustee attempted to take possession on default.—*In re Life Association of America*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 69.

193. MORTGAGES—Foreclosure—Distribution of Assets.—Where a mortgage is given to secure several notes, without any stipulation as to priority, and the notes are assigned to different persons, the assignees are all entitled to share *pro rata* in the proceeds of foreclosure.—*Penzel v. Brookmire*, S. C. Ark., Dec. 1, 1888; 10 S. W. Rep. 15.

194. MUNICIPAL CORPORATIONS—Boundaries—Construction of Statute.—Acts Cal. 1875 76, p. 806, defining boundaries of San Diego, include the peninsula within the city limits.—*City of San Diego v. Grannis*, S. C. Cal., Dec. 12, 1888; 19 Pac. Rep. 875.

195. MUNICIPAL CORPORATION—Negligence—Instruction.—Instruction in suit against city for damage by overflow, caused by negligent construction of embankment in raising the grade of street, that proof that no grade was established and that filling the street caused the water to flow in, was sufficient proof of negligence: Held, error.—*Kerney v. Thomsomson*, S. C. Neb., Dec. 15, 1888; 41 N. W. 115.

196. MUNICIPAL CORPORATIONS—Obstruction—Sidewalk.—Where snow has fallen causing some obstruction on the sidewalks of a city, it is the duty of the city authorities within a reasonable time thereafter to remove such obstruction. The falling of snow is sufficient notice.—*Foxworthy v. City of Hastings*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 132.

197. MUNICIPAL CORPORATIONS—Bonds.—Under § 52, art. 2, ch. 14, Comp. St. 1887, the city of K has the right to issue bonds in order to erect necessary buildings for the city.—*State v. Babcock*, S. C. Neb., Dec. 14, 41 N. W. Rep. 155.

198. MUNICIPAL CORPORATIONS—Defective Sewer.—Sufficiency of evidence to show that commissioner of streets waived compliance with formality of written

permit, under city ordinance requiring same, to enable party to drain into a common sewer. — *Sheridan v. City of Salem*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 173.

199. NAVIGABLE WATERS—Obstruction by Bridges. — The grant of a license to railroad company to build bridges over certain rivers, theretofore leased with certain locks and dams, for navigation, provided said bridges do not obstruct navigation, does not impair the right of the lessee of the river. — *Green, etc. Co. v. Chesapeake, etc. Co.*, Ky. Ct. App., Dec. 11, 1888; 10 S. W. Rep. 6.

200. NEGLIGENCE—Sidewalks—Evidence. — In an action against a city for injuries received from a defective sidewalk, testimony of the condition of the walk after the accident is inadmissible, in the absence of evidence that its condition was the same at the time of the accident. — *Hoyt v. City of Des Moines*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 63.

201. NEGLIGENCE—Injury—Violation of Ordinance. — Contributory negligence of plaintiff must be pleaded and proved by defendant. Violation of ordinance regulating speed of trains is *per se* negligence. — *Schlereth v. Mo. Pac. Ry. Co.*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 66.

202. NEGOTIABLE INSTRUMENT—Gift. — In *assumpsit*, for amount of note, given to plaintiff by her father and by her left with defendant her (now) divorced husband: Held, that plaintiff's right to recover was not affected by the fact that the note had never been indorsed over to him. — *Letts v. Letts*, S. C. Mich., Nov. 28, 1888; 41 N. W. Rep. 99.

203. NEGOTIABLE INSTRUMENTS—Notice—Pleading. — Where the indorser receives his mail at the place where the note indorsed is payable, a notice of non-payment duly placed in the post-office, and actually received by him on the day following the last day of grace, is sufficient to charge him as indorser. — *Hendershot v. Nebraska Nat. Bank*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 133.

204. OLEOMARGARINE—Exposure for Sale—Open Packages. — Exposing oleomargarine for sale as required by St. Mass. 1886, ch. 317, § 1, but with the top removed so as to expose to view the contents, which are to be sold at retail in small quantities, is not a violation of the law. — *Commonwealth v. Bean*, S. J. C. Mass., Jan. 1, 1889; 19 N. E. Rep. 163.

205. ORDER—Appeal. — An order striking a cause from the calendar because prematurely noticed for trial is not appealable. — *Hornicon Shooting Club v. Gorsline*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 78.

206. PARTIES—Intervention. — A mere general creditor of a debtor, having no claim or interest in the goods, cannot intervene in an action between lienholders or owners of goods. — *Welborn v. Eskey*, S. C. Neb., Dec. 13, 1888; 40 N. W. Rep. 959.

207. PARTITION—Of Homestead—Use by Minors—Constitutional Law. — Const. Tex. art. 16, § 52, prohibiting the partition of land used as a homestead, does not prevent the homestead from entering into the partition of the estate, providing the right of the minor children to use it during such permission is not infringed by such partition. — *Hudgins v. Sansom*, S. C. Tex., Dec. 7, 1888; 10 S. W. Rep. 104.

208. PARTITION—Equity—Pleading—Multifariousness. — A bill is multifarious which asks for the partition of two tracts of land, of one of which plaintiff's ancestor died seized as tenant in common with his brother, while of the other he died seized as tenant in common with his brother and a third person. — *Reckfus v. Lyon*, Md. Ct. App., Dec. 14, 1888; 16 Atl. Rep. 233.

209. PARTITION—Judicial Proceedings. — In partitioning several parcels of land, the law does not require that a portion of each parcel should be set off in severalty to each tenant in common, but only that the partition shall be so made that each of the tenants shall become owners in severalty in exact proportion in value to his undivided interest. — *Stannard v. Sperry*, S. C. Err. Conn., Jan. 8, 1889; 16 Atl. Rep. 261.

210. PARTITION—Parol—Execution of Deeds. — A parol partition of land, acquiesced in for a long time by the parties, cannot be disturbed, but suit may be main-

tained to ascertain the precise terms on which it was made, and to have deeds of partition executed. — *Frederick v. Frederick*, W. Va. Ct. App., Nov. 24, 1888; 88 E. Rep. 235.

211. PARTITION—Place of Suit. — An action by guardians for sale of land, for division of the proceeds and reinvestment, is properly brought in the county in which the father, from whom the land descended, died, and in which only a portion of it is situated. — *Phalan v. Louisville, etc. Co.*, Ky. Ct. App., Dec. 13, 1888; 10 S. W. Rep. 10.

212. PARTNERSHIP—Pleading—Names of Partners. — Bill brought by partnership in firm name must allege their individual names. — *Lewis v. Cline*, S. C. Miss., Nov. 19, 1888; 5 South. Rep. 112.

213. PARTNERSHIP—Contracts. — Where a promissory note was executed in the firm name by one of the partners, and a chattel mortgage to secure said note was also executed in the firm name by the same partner, the presumption is that the instruments were executed on behalf of the firm. — *Schwank v. Davis*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 143.

214. PARTNERSHIP—Parties. — Action can be maintained by A and B as partners for deceit in quantity of land sold, though the purchase was in the name of one, but the funds furnished by the partnership. — *Peaks v. Graves*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 151.

215. PARTNERSHIP—Appearance—Injunction—Pleading. — In an action by a partner to enjoin a judgment rendered against the firm of which he was a member, upon the ground that he was not served with process, it appeared that he was absent from the State, and service was made upon the managing member of the firm: Held, that the service was sufficient to sustain a judgment against the firm so far as to subject firm property. — *Winters v. Means*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 157.

216. PAYMENT—Assignment—Check. — In an action for goods sold, and question of payment arose: Held, that the transaction constituted a payment, and not an assignment. — *Tiddy v. Harris*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 227.

217. PAYMENT—Application. — Question of application of payment where purchaser bought one lot and assumed payment on another. — *Blair, etc. Co. v. Hillis*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 6.

218. PLEADING—Variance—Amendment. — A bill to enjoin sale of land: Held, under Code Miss. § 1881, that amendment making bill conform to proof should be permitted. — *Jeffries v. Jeffries*, S. C. Miss., Nov. 26, 1888; 5 South. Rep. 112.

219. PLEADING—Vender and Vendee—Title. — On contract to sell real estate, where parties agreed to trade on strength of abstract showing good title, if abstract fails to show this, money can be recovered, even if defendant offered to perfect title. — *Horn v. Butler*, S. C. Minn., Dec. 18, 1888; 40 N. W. Rep. 833.

220. PLEADING—Substitution—Continuance. — In an action after the issues had been made up, it was discovered that the files were mislaid. The court thereupon permitted the filing of a substituted petition *instantly*, and required the defendant to go to trial at once: Held, that a reasonable time should have been given the defendant to answer and prepare for trial. — *Fremont, etc. Co. v. Marley*, S. C. Neb., Dec. 13, 1888; 40 N. W. Rep. 948.

221. PRACTICE IN CIVIL CASES—Dismissal—Entry of Judgment. — Under Code Civil Proc. § 581, subd. 6, it is not error to refuse to dismiss an action where six months have not elapsed since the act went into effect, though more than six months have elapsed since verdict. — *Gardner v. Tatum*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 879.

222. PRINCIPAL AND AGENT—Special Agents. — A special agent, who acts within his apparent power, will bind his principal by his contracts, even if he has received private instructions which limit his special authority. — *Howell v. Graff*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 142.

223. **PRINCIPAL AND AGENT—Shipping.**—A ship's husband cannot, without express authority from the owners, render them liable for money borrowed on the vessel's account.—*Arey v. Hall*, S. J. C. Me., Dec. 8, 1888; 16 Atl. Rep. 302.

224. **PRINCIPAL AND SURETY—Alteration of Instrument.**—The unauthorized insertion in a bond given to secure the performance of his legal duties by one applying for a permit to engage in the liquor traffic, is not such a material alteration as to discharge the sureties on the bond.—*Starr v. Blatner*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 41.

225. **PRINCIPAL AND SURETY—Release.**—Under the provisions of Civil Code Cal., relating to sureties and guarantors, the same circumstances which would release a guarantor will also exonerate a surety.—*Chafoin v. Rich*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 882.

226. **PROHIBITION—Court of Appeals—Jurisdiction.**—Prohibition lies to prevent court of appeals from exercising jurisdiction in case where amount exceeds jurisdiction limit.—*State v. Judges*, S. C. La.; 5 South. Rep. 114.

227. **PUBLIC LANDS—Swamp Lands.**—A purchaser of swamp land for the board of commissioners, who had paid the money and received certificate before the passage of the act of April 2, 1871, acquired the equitable title, which was sufficient, as against purchasers from the corporation.—*Bradford v. Hall*, U. S. C. C. (Miss.), Nov. 20, 1888; 36 Fed. Rep. 801.

228. **RAILROAD COMPANIES—Negligence—Violation of Ordinance.**—In an action for an injury occasioned by the moving of trains in a yard, allegations in the petition of non-compliance with municipal ordinances regulating the speed of trains should be struck out, such ordinances not being applicable to railroad yards.—*Grube v. Mo. Pac. Ry. Co.*, S. C. Mo., Dec. 30, 1888; 10 S. W. Rep. 185.

229. **RAILROAD COMPANIES—Taxation—Exemption.**—Under § 8 of charter of Y. & M. V. R. Co., exempting property from taxation on certain conditions, the exemption was intended to commence from completion of the road to the Mississippi river.—*Y. & M. V. R. Co. v. Thomas*, S. C. Miss., Nov. 12, 1888; 5 South. Rep. 108.

230. **RAILROAD COMPANIES—Injury—Highway.**—A railroad lawfully near a highway has right to operate road in usual manner and give usual signals of danger, without incurring liability for injury by frightened horses.—*Bailey v. H. & C. F. R. Co.*, S. C. Conn., July 7, 1888; 16 Atl. Rep. 234.

231. **RAILROAD COMPANIES—Fires.**—In an action for setting fire by a locomotive, the defendant having shown the kinds of smoke stacks in common use, and the styles in use upon its road, cannot show the style in use upon other roads.—*Metzger v. Chicago, etc. R. Co.*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 49.

232. **RAILROAD COMPANIES—Incorporation.**—In the absence of any statute or anything in the articles of incorporation of a railroad company, the company is authorized to begin business as soon as its articles of incorporation are filed in the recorder's office, as provided by Code Iowa, § 1064.—*Johnson v. Kessler*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 87.

233. **RAILROAD COMPANIES—Purchase—Foreclosure.**—Under charter of railroad company succeeding another company by purchase under foreclosure: *Held*, that defendant having completed the road laid out by the original company became liable for the value of land appropriated.—*Hendrick v. C. C. R. Co.*, S. C. N. Car., Dec. 19, 1888; 8 S. E. Rep. 236.

234. **RAILROAD COMPANIES—Mortgages—Foreclosure—Leases.**—On foreclosure of the railroad mortgage in this case and the adjustment of claims of intervening creditors, the contract of lease of cars to the mortgage company by the car company dominated by the same persons, cannot be made the basis of an accounting for the use of the leased cars.—*Thomas v. Peoria, etc. Co.*, U. S. C. C. (Ill.), Aug. 29, 1888; 36 Fed. Rep. 508.

235. **RESCISSION OF CONTRACT—Undue Influence.**—Facts sufficient to set aside conveyance on ground of

incapacity and undue influence.—*Kelly v. Smith*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 69.

236. **REFORMATORIES—Habeas Corpus—Appeal.**—In a proceeding for the commitment of a juvenile offender to the reform school, under the law as it existed in the year 1886, the question of the age of the accused was one of fact, to be decided by the trial magistrate.—*Buchanan v. Mallatieu*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 152.

237. **REINSURANCE—Rights of Mortgagee.**—Where a mortgagee, to secure his interest in the mortgaged premises, takes out a policy of insurance thereon, running to the mortgagors, containing a stipulation against reinsurance, the policy is defeated by unauthorized insurance obtained on the property by one of the mortgagors.—*Gillet v. Liverpool, etc. Co.*, S. C. Wis., Dec. 29, 1888; 41 N. W. Rep. 78.

238. **REPLEVIN—Partition—Pleading.**—Averments necessary in partition, under § 196 of the code, in reference to replevin suit.—*Hershiser v. Jordan*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 147.

239. **REPLEVIN—Parties—Intervention.**—A party who claims to be the owner of goods which are in controversy, in an action of replevin, may intervene in the case, upon filing a petition before judgment, alleging his ownership.—*Welborn v. Eskey*, S. C. Neb., Dec. 13, 1888; 40 N. W. Rep. 960.

240. **SALE—Delivery—Fraud.**—Every sale made by a vendor of goods in his possession, unless the same be accompanied by an immediate delivery, and be followed by actual change of possession of the thing sold, is presumed to be fraudulent as against subsequent purchasers in good faith.—*Fitzgerald v. Meyer*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 123.

241. **SALE—Pleading—Admission.**—In an action for the price of a team, the answer alleged that plaintiff received the note of one G in payment, and gave his own note to defendant for the difference between the price of the team and the amount of G's note: *Held*, an admission that the price of the team was the difference between the amount of plaintiff's note and the sum due on G's.—*McKenna v. Noy*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 29.

242. **SALE—Conditional—Failure to Record Contract.**—Relatively to subsequent creditors of the purchaser, a conditional sale of chattels, not duly recorded, is the same as an absolute sale.—*Steen v. Harris*, S. C. Ga., Dec. 10, 1888; 8 S. E. Rep. 206.

243. **SALE—Evidence.**—In an action for the price of goods, testimony of the agent who sold the goods that he sold them to defendant for the price named by plaintiff is not objectionable as stating a conclusion of law.—*Julius King Optical Co. v. Treat*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 912.

244. **SCHOOL DISTRICTS—Officers.**—No cause of action will accrue to the district as a corporation against the county superintendent for the manner in which he may exercise his discretion in changing the boundary of said district.—*School district v. Wheeler*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 143.

245. **SCHOOL DISTRICTS—Powers.**—Construction of powers of electors of school districts under Acts Gen. Assem. Iowa, ch. 172, § 7.—*McShane v. Board*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 33.

246. **SCHOOLS AND SCHOOL DISTRICTS—Schools—Establishment.**—The provision of Pub. St. Mass. ch. 46, § 14, as to establishment of schools is mandatory.—*City of Lynn v. County Commissioners*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 171.

247. **SCHOOLS AND SCHOOL DISTRICTS—Annexation and Division—Conclusiveness of Inspector's Return.**—Under How. St. Mich. § 5041, a return by the board of school inspectors, stating that the persons consenting are a majority of the resident tax-payers of the districts, is conclusive.—*Gentle v. Board School Inspectors*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 928.

248. **SPECIFIC PERFORMANCE—Rescission of Contract—Purchaser with Notice.**—A purchaser from the grantee

with notice of the rescission acquires no title to the premises, nor any right to specific performance.—*Kendy v. Emby*, S. C. Tex., Nov. 27, 1888; 10 S. W. Rep. 88.

249. SPECIFIC PERFORMANCE—Decree—Foreign Corporation.—In this State a personal decree may be rendered for specific performance against a foreign corporation upon which actual service has been had within the State under the provision of our statute.—*Shaffer v. O'Brien*, W. Va., Ct. App., Dec. 1, 1888; 8 S. E. Rep. 298.

250. SPECIFIC PERFORMANCES—Description.—Question as to the definiteness and certainty of description of land, sale of which specific performance was sought.—*Minn. & L. R. Co. v. Cox*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 24.

251. STATUTE—Construction—County Treasurer.—Under acts N. C. 1876, ch. 141, § 2, and acts 1881, ch. 362, § 1, by appointment the county justices have the power to restore the office of county treasurer though the sheriff, upon whom its duties had developed during the period of its abolition, had previously entered upon a new term of office.—*Rhodes v. Hampton*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 219.

252. SUBROGATION—Mortgage—Foreclosure.—Question of right of subrogation, upon the facts of the case, under a mortgage.—*Johnson v. Barrett*, S. C. Ind., Dec. 21, 1888; 19 N. E. Rep. 199.

253. TAXATION—Tax title—Purchaser's Title.—A purchaser at tax-sale under proceedings against the patentee, whose patent is not of record in the county, and who has parted with his title, takes no title as against one claiming under a recorded conveyance from the patentee's grantee, though the intermediate conveyance is not recorded.—*Allen v. Ray*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 153.

254. TAXATION—Redemption—Tax-sale.—Under Code Miss. § 531, a redemption within the time divests all title of a purchaser, though the redemptionist is not the real owner of the land.—*Jamison v. Thompson*, 5 South. Rep. 107.

255. TAXATION—Sale—Injunction.—Under act. Ala. Feb. 17, 1885, providing for the sale of land in the city of Montgomery for unpaid municipal taxes objections must be made before the recorder, and equity will not enjoin a sale on those grounds.—*Strenna v. City Council of Montgomery*, S. C. Ala., Dec. 4, 1888; 5 South. Rep. 115.

256. TAXATION—Exemption—Statutes—Repeal by Constitutional Amendment.—By the constitutional amendment adopted in 1875, all prior special laws exempting property from taxation were abrogated, unless they constituted irrepealable contracts.—*State v. Collector of Chatham*, S. C. N. J., Dec. 26, 1888; 16 Atl. Rep. 223.

257. TAXATION—Wild Lands—Redemption.—Acts Ga. 1880-81, p. 45, §§ 3, 4, providing that wild lands not returned for taxation shall be taxed doubly, etc., do not apply to wild lands regularly returned for taxation.—*Millen v. Howell*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 316.

258. TAXATION—Costs—Tender.—Costs in a suit for taxes are not "taxes, debts or demands due the commonwealth," and a tender of coupons of State bonds in payment of them is not good.—*Eliott v. Commonwealth*, Va. Ct. App., Dec. 5, 1888; 8 S. E. Rep. 246.

259. TAXATION—Taxable Property—Contract.—Four persons entered into a written agreement with a corporation to sell and convey to it certain described real estate for a sum named: *Held*, under all the facts that the debt thus arising from the corporation purchaser was an assessable credit, under the constitution and revenue laws of the State of Minnesota.—*State v. Rand*, S. C. Minn., Dec. 18, 1888; 40 N. W. Rep. 835.

260. TAXATION—Tax-sale.—Under St. Mo. §§ 3494, 3499, providing for suit for taxes against non-residents, the names must be correctly given though the wrong name appears on the recorded deed.—*Troyer v. Wood, Chamberlain v. Blodgett*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 42, 44.

261. TAXATION—Recovery of Tax Paid Under Mistake.—Taxes paid under the belief that the assessment

and collection were legal, when in fact they were unauthorized by law, may be recovered back.—*City of Newport v. Ringo's Ex'x*, Ky. Ct. App., Dec. 6, 1888; 10 S. W. Rep. 2.

262. TAX-SALE—Deed.—A tax-deed, to which the holder of the tax-certificate was entitled three years before the tax-sale under which plaintiff's claimed, and twelve years before plaintiff's tax-deed was executed, having been obtained after the right to it was barred, can not be set up to defeat the tax-title on which plaintiffs rely.—*Johns v. Griffin*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 59.

263. TAX-SALE—Redemption—Description.—Sufficiency of description in notice of and deed under tax-sale.—*Griffiths v. Utley*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 21.

264. TOWAGE—Negligence—Proceedings in Rem.—Where a canal-boat, while in tow by certain tugs, preparatory to making fast to a steamer which is to convey the tow to its destination, is injured by the negligence of the tugs, proceedings in rem cannot be maintained therefor against the steamer, though owned by the same company owning the tugs.—*Goldsmith v. The Syracuse*, U. S. C. C. (N. Y.), Nov. 14, 1888; 36 Fed. Rep. 830.

265. TOWNS—Officers—Salary of Trustee—Overseer of the Poor.—Under act Ind. March 31, 1879, § 32, one who is the duly elected township trustee, and has been paid, cannot claim a further compensation out of the county treasury, for the same time, for services as overseer of the poor.—*Board of Commissioners v. Templeton*, S. C. Ind., Dec. 20, 1888; 19 N. E. Rep. 183.

266. TOWNSHIP ORDERS—Payment.—Construction of Code Iowa, §§ 969, 971, 997, providing for payment of road orders.—*Bradley v. Loez*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 52.

267. TRADE MARK—Infringement.—*Held*, in question of infringement of trade mark, that the words used and printed were likely to mislead dealers and indicate a purpose to secure an advantage and therefore invade the right of petitioner.—*Keller v. Goodrich Co.*, S. C. Ind., Dec. 21, 1888; 19 N. E. Rep. 196.

268. TRESPASS—Damages—Remote Injuries.—In trespass against a railway company for invading plaintiff's garden and laying its track within 30 feet of the house, no recovery can be had for hazard to the house by the proximity of the tracks and the consequent danger from fire.—*Fore v. Western N. C. R. Co.*, S. C. N. Car., Dec. 18, 1888; 8 S. E. Rep. 335.

269. TRESPASS—Fences.—One who causes his cattle to be herded upon the unimproved and unenclosed prairie land of another, without the latter's consent, is liable therefor to the owner, though by the Iowa law a trespass is not committed when cattle running at large entered unenclosed land.—*Harrison v. Adamson*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 34.

270. TRIAL—Province of Court—Jury.—Upon facts of the case involving complicated computation of interest: *Held*, that the court's action, in the instructions, was not an interference with the province of the jury.—*People v. Sav. Bank, v. Borough of Norwalk*, S. C. Conn., Jan. 8, 1889; 16 Atl. Rep. 257.

271. TRIAL—Remarks of Judge.—Defendant, while a witness, testified to irrelevant matter and made threats and interruptions, in spite of judge's admonitions who finally threatened to commit him for contempt: *Held*, that defendant could not complain that this tended to prejudice him before the jury.—*Bowden v. Bales*, S. C. N. Car., Dec. 19, 1888; 8 S. E. Rep. 342.

272. TRIAL—Verdict—Special Findings.—Whether a special finding that a party has executed a warranty deed, without setting out its terms, is a conclusion of law, is immaterial in facts of this case.—*Indiana, etc. Co. v. Fennell*, S. C. Ind., Dec. 22, 1888; 19 N. E. Rep. 204.

273. TRIAL—Verdict—Form.—In ejectment, the jury having rendered a verdict for "the amount or quantity of ground claimed," it is proper to direct plaintiff's attorney to formulate the verdict, setting out the land by metes and bounds.—*Goebel v. Pugh*, Ky. Ct. App., Dec. 15, 1888; 10 S. W. Rep. 1.

274. TRUSTS—Presumption—Rebuttal.—Where a conveyance of land is made to a wife at the husband's instance, the presumption of a resulting trust in his favor is rebutted, though he furnished the purchase money.—*Gilliland v. Gilliland*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 139.

275. TRUST—Resulting Trust—Evidence.—Facts in this case held not sufficient to create a resulting trust.—*Adams v. Burns*, S. C. Mo., Nov. 26, 1888; 10 S. W. Rep. 26.

276. TRUST—Constructive Trust—Evidence.—Held, that the evidence justified the finding that no fraud was perpetrated on plaintiff by defendant, and that the latter was not a constructive trustee.—*Nesbitt v. Cavender*, S. C. S. Car., Dec. 7, 1888; 8 S. E. Rep. 193.

277. TRUSTS—Rights of Creditors.—An income, given by the will of the wife to the husband on condition of his executing a release of his estate by the curtesy, which he executes accordingly, is subject to the claims of the husband's creditors, notwithstanding the provisions of the will to the contrary. Distinguishing *Lampert v. Haydel*, 9 S. W. Rep. 780.—*Bank of Commerce v. Chambers*, S. C. Mo., Nov. 26, 1888; 10 S. W. Rep. 38.

278. USURY—Penalties and Forfeiture.—Under 18 Stat. S. Car. (1882) p. 35 § 1, in reference to usury, where a note containing an express agreement that the interest shall run to the maturity of the note at ten per cent., is discounted by a bank at ten per cent. on the principal and interest to accrue, the charge of discount on the interest, to the extent of three per cent., the excess over seven per cent., the legal rate, is usurious.—*Carolina Sav. Bank v. Parrott*, S. C. S. Car., Dec. 7, 1888; 8 S. E. Rep. 199.

279. VENDOR AND VENDEE—Parol Trust.—Under the facts, a pretended sale of real estate was held neither a sale nor an agreement to sell, but an express trust, which, under Code Iowa, § 1934, cannot be established by parol.—*Andrews v. Concannon*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 8.

280. WARRANTY—Deed—Merger.—A warranty deed in the usual form does not merge a prior parol warranty of quality of the land conveyed, so as to preclude the grantee from recovering damages for breach of the warranty.—*Saville v. Chalmers*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 30.

281. WARRANTY—Evidence—Damages.—An order addressed to plaintiff, authorizing him to procure of the manufacturer a machine for which defendant agreed to pay, is not a contract with the manufacturer, it appearing that plaintiff had no authority to make it for the manufacturer.—*Jackson v. Mott*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 12.

282. WATER-COURSES—Diversion of Water—Compensation.—On a hearing, under act Conn. 1870, to assess damages for the withdrawal of water from a stream, a mill owner may testify as to the profits received from his mill in a year after the water was withdrawn.—*Borough of Norwalk v. Blanchard*, S. C. Err. Conn., Sept. 21, 1888; 16 Atl. Rep. 242.

283. WATER-COURSE—Damages—Evidence.—In an action for damage by reason of back water and overflow, estimates of farmers and neighbors as to the quantity of water which flowed through the channel is admissible.—*Noe v. C. & B. Q. R. Co.*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 42.

284. WATER AND WATER-COURSES—Obstruction—License.—A grantee of water privileges, who is without right to dam up the water so as in any manner to overflow a certain spring on the premises, cannot obstruct or affect it injuriously by erecting a dam or embankment across its outlet.—*Ford v. Lukens*, S. C. Ga., Dec. 10, 1888; 8 S. E. Rep. 313.

285. WIDOW'S ELECTION.—A devise of a life-estate to the testator's widow does not bar her right to a distributive share in his realty.—*Howard v. Watson*, S. C. Iowa, Dec. 19, 1888; 41 N. W. Rep. 45.

286. WIFE'S SEPARATE ESTATE.—Where a husband, in good faith, while he is solvent, gives his wife money, and borrows it of her, giving a mortgage to secure it, his creditors, whose debts were contracted long after, cannot charge her with it as garnishee.—*Beck v. Lincoln*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 61.

287. WILLS—Construction.—Devise to children after death of wife held void, where property is left absolutely to wife.—*McClellan v. Larchar*, N. J. Ct. Chan., Dec. 27, 1888; 16 Atl. Rep. 269.

288. WILL—Construction.—Held, under the terms of the will that three married daughters took the land to the exclusion of a married daughter who had died before her mother, the intestate.—*Robertson v. Garret*, S. C. Tex., Dec. 21, 1888; 10 S. W. Rep. 96.

289. WILLS—Legatees—Interest.—The general rule is that where no time is fixed by the will for the payment of a general legacy, interest will begin to accrue on it at the end of a year from the testator's death.—*Davison v. Rake*, S. C. N. J., Dec. 18, 1888; 16 Atl. Rep. 227.

290. WILLS—Pleading—Attestation.—Sufficiency of averment of non-attestation of will in suit to set it aside.—*In re Burrell's Estate*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 880.

291. WILLS—Construction—Life Estate—Power of Disposal.—A testator, gave the general residue of his estate to his wife, "to her use and behoof and dispose of for her maintenance during her natural life." Held, that she could, acting in good faith, sell the bulk of the property for the consideration of a life-support.—*Richardson v. Richardson*, S. J. C. Me., Nov. 19, 1888; 16 Atl. Rep. 250.

292. WILLS—Devise.—Bequest to wife of property so long as she may live followed by bequest to daughter of so much as may remain at death of wife creates life estate in wife, with power of disposition.—*In re Foster's Will*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 43.

293. WILL—Construction—Ambiguity.—A testator gave to his wife certain land for use during her life, certain personal property, and a legacy of \$1,000. By a subsequent clause he bequeathed to his daughter, at his wife's death, "all the property of all descriptions that I have heretofore willed to my wife." Held, that under the term "property," the daughter was not entitled to take the legacy of \$1,000 given to the wife; the latter dying before the testator.—*Patterson v. Wilson*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 229.

294. WILLS—Proof—Citation.—Construction of Code N. C. § 2148, providing for proof of uncapacitated wills.—*In re Haygood's Will*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 222.

295. WILLS—Construction—Ambiguity.—A condition annexed to a devise, avoiding it if the beneficiary marry into the "family" of a person named, in the absence of anything in the context to the contrary, means one of the children of such person.—*Phillips v. Ferguson*, Va. Ct. App., Dec. 5, 1888; 8 S. E. Rep. 241.

296. WILL—Construction.—Question under terms of will whether a sum of money was left absolutely or merely in case of any excess in the estate.—*Noyes v. Pritchard*, S. J. C. Mass., Dec. 31, 1888; 19 N. E. Rep. 162.

297. WILLS—Construction—Description of Devisees.—Testator devised land to his wife for life, "and after her death unto the heirs of my daughter, E and the heirs of my son H, which said heirs shall take as purchasers from me, and not by inheritance or of descent from my said wife." Held, that the heirs of E and H took *per stirpes*, and not *per capita*.—*Preston v. Brant*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 78.

298. WITNESS—Examination—Collateral Matters.—Though it is error to admit evidence to contradict witnesses as to collateral matters, the error is rendered harmless by subsequently recalling such witnesses, and allowing them to explain their former testimony.—*Patterson v. Wilson*, S. C. N. Car., Dec. 18, 1888; 8 S. E. Rep. 341.

299. WITNESS—Competency—Transactions with Decedent.—In an action involving title to land, where the question is whether the plaintiff's ancestor owned certain land which he sold in order to buy the land in dispute, testimony of his widow that she saw the deed to the land in dispute to her husband, in her husband's possession, that she saw him start off with the money, and bring back the deed, is not inadmissible under Code N. C. § 590.—*McCall v. Wilson*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 225.